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A TREATISE

UPON SOME OF THE

GENERAL PRINCIPLES OF THE LAW,

WHETHER OF A

LEGAL, OR OF AN EQUITABLE NATURE,

INCLUDING THEIR

RELATIONS AND APPLICATION

TO

ACTIONS AND DEFENSES

IN GENERAL,

WHETHER IN

COURTS OF COMMON LAW, OR COURTS OF EQUITY;

AND EQUALLY ADAPTED TO

COURTS GOVERNED BY CODES.

By WILLIAM WAIT,

COUNSELOR AT LAW.

VOLUME IV.

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CHAPTER LXXXI.

INNKEEPERS.

TITLE I.

OF INNKEEPERS GENERALLY.

ARTICLE I.

DEFINITION AND NATURE.

Section 1. Definition. One who keeps a common inn for the lodging and entertainment of travelers and passengers, their horses and attendants, for a reasonable compensation, is an innkeeper. Story on Bailm., § 475; *Cromwell* v. *Stephens*, 2 Daly, 15; 3 Abb. (N. S.) 26. It is not necessary that he should put up a sign as keeper of an inn. *Parker* v. *Flint*, 12 Mod. 254; *Overseers, etc., of Crown Point* v. *Warner*, 3 Hill (N. Y.), 150; *Dickerson* v. *Rogers*, 4 Humph. (Tenn.) 179. unless required by statute, as by Laws N. Y. 1857, ch. 628, § 9; 2 R. S. 936, § 15, Banks' ed. He is one who receives as guests all who choose to visit his house without any previous agreement as to the time or the terms of their stay. *Wintermute* v. *Clarke*, 5 Sandf. (N. Y.) 242. But one who entertains strangers occasionally, although he may receive compensation for it, is not an innkeeper. *Lyon* v. *Smith*, Morris (Iowa), 184; Bouv. Law Dict. 714. Nor is one who keeps an inn merely for a short season of the year, and for select persons who are lodgers. Story on Bailm., § 475.

An inn has been defined to be a house where the traveler is furnished with every thing for which he has occasion whilst on his way. *Thompson* v. *Lacy*, 3 B. & Ald. 283; *Holder* v. *Soulby*, 8 J. Scott (N. S.), 254.

§ 2. **Who are innkeepers.** The owner of a house of public entertainment, *e. g.*, a tavern and a coffee house, where lodging and entertainment were provided for travelers and others indiscriminately, but which were not frequented by stage coaches and wagons, and had no stable belonging to them, was considered subject to the liabilities of an innkeeper, even where the guest did not appear to have been a traveler, but one who had previously resided in ready furnished lodgings.

Thompson v. *Lacy*, 3 B. & Ald. 283. But the keeper of a mere coffee house is not an innkeeper (*Doe* v. *Laming*, 4 Camp. 74); nor is one who keeps a mere private boarding-house or lodging-house (*Southwood* v. *Myers*, 3 Bush [Ky.], 681); nor is the keeper of a restaurant. *Carpenter* v. *Taylor*, 1 Hilt. (N. Y.) 193; *People* v. *Jones*, 54 Barb. 311.

The proprietor of a public house, designated as a "hotel," where all comers register their names and are furnished with rooms without special agreement, and where meals are furnished on the "European plan," is an innkeeper with all the responsibilities of such a character in respect to the guests who lodge in his house. *Krohn* v. *Sweeney*, 2 Daly (N. Y.), 200. And one who, without license, entertains a circus *troupe* and occasionally transient guests, *presumes*, under the Massachusetts statute, to be an innkeeper, although he keeps no stable and part of his house is used as a grocery. *Commonwealth* v. *Wetherbee*, 101 Mass. 214. Where a company is the proprietor of an inn, although the justice's license is in the name of a paid manager, yet an action for the loss of a guest's goods cannot be maintained against such manager. The company is the real "innkeeper." *Dixon* v. *Birch*, L. R., 8 Exch. 135; 5 Eng. R. 330.

§ 3. **Who are guests.** It is sometimes difficult to define what constitutes the relationship of innkeeper and guest. *Ingalsbee* v. *Wood*, 36 Barb. (N. Y.) 452. It makes no difference how long a man remains at an inn, whether his stay be of days', weeks' or months' duration, *so long as he retains his character as a traveler*, he is a guest. *Smith* v. *Keyes*, 2 N. Y. Sup. (T. & C.) 650; *Shoecraft* v. *Bailey*, 25 Iowa, 553; *Norcross* v. *Norcross*, 53 Me. 163; *Julie* v. *Cardinal*, 35 Wis. 118. A townsman or a neighbor may be a traveler, and therefore a guest at an inn, as well as he who comes from a distance, or from a foreign country. *Walling* v. *Potter*, 35 Conn. 183. A lumberman who stays at a hotel two or three days, and then, stating that he should be there frequently during the summer, procures a deduction of one-half from the regular rate, is a guest and not a regular boarder. *Shoecraft* v. *Bailey*, 25 Iowa, 553. A guest is a wayfarer who stops at an inn, and is accepted. *Manning* v. *Wells*, 9 Humph. 746.

In order to constitute one a guest at an inn, it is not necessary to be there in person; it is sufficient if his property be there in charge of his wife, servant or other member of his family. *Coykendall* v. *Eaton*, 55 Barb. (N. Y.) 188; S. C., 37 How. (N. Y.) 438; *Piper* v. *Manny*, 21 Wend. 282. If a person puts up his horse at an inn it makes him a guest, and the relation extends to all his goods left at the inn, by his taking a room, and by his taking some of his meals at the inn and

lodging there a portion of the time. *McDaniels* v. *Robinson*, 26 Vt. 316; *Washburn* v. *Jones*, 14 Barb. (N. Y.) 193. But if an innkeeper agrees to keep a stallion for two days in a week during the season, and to furnish feed and a specified box-stall in his stable, and to board the man in charge of the horse at less than the usual price to guests, and the horse is burned to death by a fire which consumed the stable, the innkeeper is not liable, as the relation of guest and innkeeper does not exist. *Mowers* v. *Fethers*, 61 N. Y. (16 Sick.) 34; 19 Am. Rep. 244. Where a fire company gives a ball, at an inn, where rooms for dancing, dressing, and supper are furnished by an innkeeper who is paid therefor by the company, which sells tickets for the ball to parties who desire them, at a specified price, and the clothing of a person purchasing a ticket and attending the ball is stolen, the innkeeper is not liable, as such person is not his guest. *Carter* v. *Hobbs*, 12 Mich. 52. Purchasing liquor at an inn is sufficient to constitute the buyer a guest. *McDonald* v. *Edgerton*, 5 Barb. 560.

§ 4. **Distinction between innkeepers and boarding-housekeepers.** One who keeps a house principally for the accommodation of emigrants is not a boarding-housekeeper; he is an innkeeper. The great distinction between a boarding-house and an inn is that in a boarding-house the guest is under an express contract, at a certain rate, for a certain period of time; but in an inn there is no express agreement. The guest being on his way is entertained from day to day, according to his business, upon an implied contract. *Willard* v. *Reinhardt*, 2 E. D. Smith (N. Y.), 148; *Shoecraft* v. *Bailey*, 25 Iowa, 553; *Chamberlain* v. *Masterson*, 26 Ala. 371.

An inn is distinguished from a private boarding-house mainly in this, that the keeper of the latter is at liberty to choose his guests, while the innkeeper is obliged to entertain and furnish all travelers of good conduct and means of payment with what they have occasion for whilst on their way. *Pinkerton* v. *Woodward*, 33 Cal. 557.

A hotel keeper is subject to the same liabilities as an innkeeper. *Jones* v. *Osborn*, 2 Chit. 484; *Chamberlain* v. *Masterson*, 26 Ala. 371.

ARTICLE II.

DUTIES AND LIABILITIES AT COMMON LAW.

Section 1 Duty to receive and to entertain guests. An innkeeper is bound to take in and to receive all travelers and wayfaring persons, and to entertain them for a reasonable compensation, if he can accommodate them. *Thompson* v. *Lacy*, 3 B. & A. 283; *Grin-*

nell v. *Cook*, 3 Hill (N. Y.), 485; *Hawthorn* v. *Hammond*, 1 C. & K. 404. Where a guest has engaged and paid for a night's lodging, and the innkeeper refuses to let him have it, and then turns the guest out of the inn with abusive and insulting language, he is liable for exemplary damages. *M'Carthy* v. *Niskern*, 22 Minn. 90. A guest is not entitled to select particular apartments, nor to occupy a bedroom for the purpose of sitting up all night, so long as the innkeeper is willing and offers to furnish him with a proper room for that purpose. *Fell* v. *Knight*, 8 M. & W. 269; 5 Jur. 554.

If an innkeeper improperly refuses to receive or to provide for a guest, he is liable to be indicted therefor. *Rex* v. *Ivens*, 7 C. & P. 213. But, he may not only refuse to receive a guest who conducts himself in a disorderly and noisy manner; he may compel him, under such circumstances, to leave the inn even after he has been received as a guest. Id.; *Markham* v. *Brown*, 8 N. H. 523; *Howell* v. *Jackson*, 6 C. & P. 723; *Commonwealth* v. *Mitchell*, 2 Pars. (Penn.) Sel. Cas. 431; *ante*, Vol. 1, 343.

§ 2. **Liability for property of guest.** The liability of an innkeeper is the same in character and extent as that of a common carrier. 2 Kent's Comm. 592; *Treiber* v. *Burrows*, 27 Md. 130. And it is not limited to property of any particular kind or value; it embraces all the personal property of the guest brought to the inn. *Kellogg* v. *Sweeney*, 1 Lans. (N. Y.) 397; 46 N. Y. (1 Sick.) 291; 7 Am. Rep. 333; *Pinkerton* v. *Woodward*, 33 Cal. 557. He is responsible for money belonging to his guest. *Kent* v. *Shuckard*, 2 B. & Ad. 803; *Wilkins* v. *Earle*, 49 N. Y. (5 Hand) 172; 4 Am. Rep. 655. But this liability only extends to such goods as are brought into the inn in the character of guests. *Mateer* v. *Brown*, 1 Cal. 221. He is liable for the loss of a parcel left in the lobby or hall of the inn. *Candy* v. *Spencer*, 3 F. & F. 306; *Norcross* v. *Norcross*, 53 Me. 163. And he is bound to *extraordinary* diligence in preserving the property of his guests intrusted to his care. *Gile* v. *Libby*, 36 Barb. (N. Y.) 70; *Packard* v. *Northcraft*, 2 Metc. (Ky.) 439; *Sasseen* v. *Clark*, 37 Ga. 242. His liability continues until the guest with his property has left the premises of the inn. *Seymour* v. *Cook*, 53 Barb. (N. Y.) 451. And he is not exonerated from his liability although the guest do, with the innkeeper's assent, what it was the latter's duty to do, as where a guest, preparing to depart, leads, with the innkeeper's consent, his own horse from the stable of the inn, and in so doing while passing a stall in which a stallion, the property of another guest, is standing, his horse is injured by the kick of the stallion. Id.

An innkeeper is generally liable only for the goods brought within

the inn. *Calye's case*, 8 Co. R. 32; 2 Kent's Comm. 592. Yet, if an innkeeper, or his servant, directs a load of the guest's goods to be deposited in a specified open, uninclosed space near the public highway and the inn, and the goods are there stolen, the innkeeper is liable. *Piper* v. *Manny*, 21 Wend. 282; *Mason* v. *Thompson*, 9 Pick. 280. It is sufficient that the goods are received into the care and keeping of the innkeeper, or *infra hospitium*. Id. But, if he did not request the innkeeper to take charge of his load of goods, nor put them in his care the innkeeper will not be liable, although they are stolen. *Albin* v. *Presby*, 8 N. H. 408. A delivery of the goods into his personal custody is not necessary in order to make him responsible; for although he may not know any thing of such goods, when delivered to his servant, he is bound to pay for them, if they are stolen or carried away, even by some person unknown. *Clute* v. *Wiggins*, 14 Johns. (N. Y.) 175; *Trieber* v. *Burrows*, 27 Md. 130; 21 id. 320; *Sasseen* v. *Clark*, 37 Ga. 242; *Packard* v. *Northcraft*, 2 Metc. (Ky.) 442.

If the agent of a corporation, engaged in their business, becomes the guest of an innkeeper, and while he is a guest, is robbed in the inn, of money delivered to him by his principals, to be expended in their behalf, the innkeeper is liable therefor to the corporation. *Berkshire Woollen Co.* v. *Proctor*, 7 Cush. 417; *Towson* v. *Havre-de-Grace Bank*, 6 H. & J. 47.

An innkeeper is not liable for the property of one who is a boarder for a time under a special contract (*Vance* v. *Throckmorton*, 5 Bush [Ky.], 41; *Neal* v. *Wilcox*, 4 Jones' L. 146); nor is he liable for the loss or embezzlement of his guest's money, when the latter does not deposit it on the security of the inn, but intrusts it to another guest or inmate (*Houser* v. *Tully*, 62 Penn. St. 92; 1 Am. Rep. 390. See *Quinton* v. *Courtney*, 1 Hayw. [N. C.] 40 [51]); nor where he retains the exclusive care and custody of his goods. *Fuller* v. *Coats*, 18 Ohio St. 343. But if a departing guest, after paying his bill, with the consent of the innkeeper, leaves his baggage in the inn, in case of loss thereof within a reasonable time, the innkeeper is liable as a depositary. *Adams* v. *Clem*, 41 Ga. 65; 5 Am. Rep. 524. So he would be liable if the guest had not paid his bill, and had departed with the intention of returning, if he left his baggage at the inn. *Murray* v. *Clarke*, 2 Daly (N. Y.), 102. If the guest who owns the goods knowingly allows another person to exercise acts of ownership over them, without informing the landlord that the goods are his, and they are carried away by such other person, the landlord is released from liability. *Kelsey* v. *Berry*, 42 Ill. 469.

§ 3. **Liability for acts of servants.** An innkeeper is responsible for the acts of his domestics and servants, as well as for the acts of his other guests, if goods of a guest are stolen or lost (*Coykendall* v. *Eaton*, 55 Barb. [N. Y.] 188; *Shaw* v. *Berry*, 31 Me. 478; *Piper* v. *Manny*, 21 Wend. 282; *Lasseen* v. *Clark*, 37 Ga. 242; *Day* v. *Bather*, 2 Hurl. & Colt. 14; *Rockwell* v. *Proctor*, 39 Ga. 105; *Treiber* v. *Burrows*, 27 Md. 130; 21 id. 320); and it has been held that he is responsible for a tort or injury done by his servants to the person of his guest, without his own co-operation or consent. *Wade* v. *Thayer*, 40 Cal. 578.

§ 4. **What excuses liability.** The innkeeper may exonerate himself from any liability for loss of goods by his guests, by showing that it was by no fault or neglect of himself or his servants, or of any other guest, that the loss occurred. *Dessauer* v. *Baker*, 1 Wilson (Ind.), 429; *Vance* v. *Throckmorton*, 5 Bush (Ky.), 41. But see *Hulett* v. *Swift*, 33 N. Y. (6 Tiff.) 571; *Shaw* v. *Berry*, 31 Me. (1 Red.) 478. And he may be exonerated by showing that the guest had taken upon himself exclusively the custody of his own goods, or had by his own neglect exposed them to the peril. *Vance* v. *Throckmorton*, 5 Bush (Ky.), 41; *Burgess* v. *Clements*, 4 M. & S. 306. An innkeeper is only *prima facie* liable for loss or damage to goods of his guest, while in his possession; and he may exculpate himself by proof that the loss did not happen through any neglect or fault on his part, or that of his servants for whom he is responsible. *Laird* v. *Eichold*, 10 Ind. 212. But the burden of proof is upon him. *Norcross* v. *Norcross*, 53 Me. 163. In respect to property brought to an inn by a guest for the purpose of carrying on any trade or business, the innkeeper is relieved from the special liability of the common law. *Myers* v. *Cottrill*, 5 Biss. 465; *Mowers* v. *Fethers*, 61 N. Y. (16 Sick.) 34; 19 Am. Rep. 244.

An innkeeper is exempt from liability for the loss of his guest's goods, when the loss is occasioned by the act of God, or of the public enemy, or through the fault of the owner, and without negligence of the innkeeper himself, or his servants. *Hulett* v. *Swift*, 42 Barb. (N. Y.) 230; S. C., 33 N. Y. (6 Tiff.) 571; *Sibley* v. *Aldrich*, 33 N. H. 553; *Merritt* v. *Claghorn*, 23 Vt. 177; *Thickstun* v. *Howard*, 8 Blackf. 535. In the case of *Hulett* v. *Swift*, *supra*, the court of appeals held that the innkeeper is responsible for the loss of the goods of his guest by fire, the cause of the fire being unknown, and the guest being free from negligence. But see Laws of N. Y. 1866, ch. 638; *Faucett* v. *Nichols*, 64 N. Y. (19 Sick.) 377, 380. In case of a loss of the goods intrusted to the innkeeper by his guests, there is a presumption of a want of proper diligence by the landlord. *Sasseen* v. *Clark*, 37 Ga. 242; *Johnson* v. *Richardson*, 17 Ill. 302; *Hill* v. *Owen*, 5 Blackf. 323.

§ 5. **Contributory negligence on the part of the guest.** Whether the guest has by his negligence contributed to produce the loss, is always a question for the jury. *Read* v. *Amidon*, 41 Vt. 15; *Cashill* v. *Wright*, 37 Eng. Law & Eq. 175. Primarily the innkeeper is responsible for the loss, and he must show contributory negligence on the part of the guest. *Fowler* v. *Dorlon*, 24 Barb. (N. Y.) 384; *Johnson* v. *Richardson*, 17 Ill. 302. Want of ordinary care on the part of the guest, in the care or management of the property, contributing to the loss, will exonerate the innkeeper from his liability. *Chamberlain* v. *Masterson*, 26 Ala. 371; *Hadley* v. *Upshaw*, 27 Tex. 547; *Profilet* v. *Hall*, 14 La. Ann. 524.

A guest at a hotel who hands his pocket-book to the clerk for safe-keeping is not guilty of negligence in not informing the clerk that there is money in the pocket-book (*Shoecraft* v. *Bailey*, 25 Iowa, 553); but if he carries a large sum of money in his valise and conceals the fact from the innkeeper, and allows the valise to be treated as mere luggage, he is guilty of gross negligence. *Fowler* v. *Dorlon*, 24 Barb. (N. Y.) 384; *Treiber* v. *Burrows*, 27 Md. 130; 21 id. 320.

A guest at an inn is not bound to keep his room locked at all times, to entitle him to recover for a robbery (*Buddenburg* v. *Benner*, 1 Hilt. [N. Y.] 84); and although the guest is provided with the key to his room on retiring for the night, and does not lock the door, yet, if his watch is stolen, the innkeeper is liable for the loss. *Classen* v. *Leopold*, 2 Sweeny (N. Y.), 705. But if a guest is guilty of gross negligence, as where he opens his driving box and counts his money in the commercial rooms, in the presence of other persons, and the box is then insecurely fastened, the innkeeper is relieved from his liability. *Armistead* v. *White*, 6 Eng. Law & Eq. 349. See *Oppenheim* v. *The White Lion Hotel Co.*, L. R., 6 C. P. 514.

§ 6. **Liability in case of gratuitous guest.** *It seems* that if an innkeeper entertains a traveler gratuitously, he will not be liable to him as a guest for all losses and damages, in the same manner as if he received a compensation. *Thompson* v. *Lacy*, 3 B. & Ald. 283.

ARTICLE III.

DUTIES AND LIABILITIES UNDER STATUTES.

Section 1. Necessity of license. At common law any person may keep an inn for the public accommodation without a license, as the keeping of it is not a franchise, but a lawful trade, open to every citizen. *Overseers, etc., of Crown Point* v. *Warner*, 3 Hill (N. Y.), 150;

Norcross v. *Norcross*, 53 Me. 163. And in New York any person may now keep an inn or tavern, and may now erect and maintain a sign, indicating that he keeps an inn, tavern or hotel, without having a license of any kind unless the sale of intoxicating liquors is made a part of the business. *People* v. *Murphy*, 5 Park. (N. Y.) 130. See, too, *Curtis* v. *State*, 5 Ham. 324.

A license, to one man to keep a tavern at his house in a village, will not authorize another, who has formed a partnership with him for the sale of spirituous liquors, to sell liquors at a house on the same lot, and within the same inclosure with the tavern. *Hall's case*, 8 Gratt. 588; *Commonwealth* v. *Estabrook*, 10 Pick. (Mass.) 293.

§ 2. **Notice to guest as affecting liability of innkeeper.** At common law, the negligence of the guest in the care of his goods generally exempts the landlord from liability for their loss. And in New York, under the provisions of the act regulating the liability of hotel keepers (chap. 42, Laws of 1855) which provide that where the proprietor of any hotel provides a safe for money, jewels or ornaments of guests, and shall post a notice stating the fact, in the rooms, if the guest shall neglect to deposit, the proprietor shall not be liable for losses, etc.; the statutory exemption applies to *all* moneys, jewels and ornaments, and applies to every case where the guest has the time and opportunity to make the deposit, however inconvenient and troublesome it may be to do so. And he must even deposit his personal jewelry and pocket-money or, as to it, the innkeeper has the protection of the statute. The guest need not be guilty of actual negligence. To neglect does not generally imply carelessness or imprudence, but simply an *omission* to do, or to perform some work, duty or act. *Rosenplaenter* v. *Roessle*, 54 N. Y. (9 Sick.) 262.

The statute does not relieve the innkeeper of his common law liability for articles not expressly mentioned, such as a watch and chain. *Ramaley* v. *Leland*, 43 N. Y. (4 Hand) 539; *Maltby* v. *Chapman*, 25 Md. 310; *Weisenger* v. *Taylor*, 1 Bush (Ky.), 275; *Pope* v. *Hall*, 14 La. Ann. 324. But see *Hyatt* v. *Taylor*, 42 N. Y. (3 Hand) 259; and *Stewart* v. *Parsons*, 24 Wis. 241.

When the guest offers to the book-keeper a large package of valuables, without stating its contents and requests him to deposit it in the safe, and the clerk responds that the package will be safe in his own room, whereupon the guest takes it to his room, it is on the part of the guest a neglect to deposit within the statute (*Bendetson* v. *French*, 46 N. Y. [1 Sick.] 266); but if the package was stolen after the guest had packed his trunk for his departure, and had ordered the trunk to be brought down from his room, then the innkeeper would be liable,

even if the package had never been handed to him or his agents to be deposited in the safe. Id.

Whether a package contains an amount of money sufficient to pay necessary traveling expenses of the guest, or a sum greatly exceeding such expenses, if the guest offers the same for deposit, describing it only as "money," yet the innkeeper is liable in the whole amount, if the package be lost. *Wilkins* v. *Earle*, 44 N. Y. (5 Hand) 172.

If an innkeeper by his negligence facilitates the setting fire to his inn, or its appurtenances, the statute of 1866 does not protect him from his common law liability for the loss by fire of his guest's goods. *Faucett* v. *Nichols*, 64 N. Y. (19 Sick.) 377; reversing S. C., 4 T. & C. (N. Y.) 597; and 2 Hun (N. Y.), 521.

ARTICLE IV.

RIGHTS AND POWERS OF INNKEEPERS.

Section 1. In general. An innkeeper has a lien upon the goods of his guest for his board and lodging, and for the liquors supplied to him (*Grinnell* v. *Cook*, 3 Hill, 485; *Jones* v. *Thurloe*, 8 Mod. 172), and he is not bound to examine into the nature and extent of the goods ordered by his guest, or the propriety of supplying him with his just wants, provided the guest is possessed of reason, and is not a minor, and the innkeeper is not guilty of fraud or imposition (*Proctor* v. *Nicholson*, 7 C. & P. 67), and he may refuse to receive and to entertain one who is not capable of paying a compensation suitable to the accommodation provided (*Thompson* v. *Lacy*, 3 B. & Ald. 283), and he may expel one who is noisy and turbulent, although he has been received as a guest. *Howell* v. *Jackson*, 6 C. & P. 723. And *it seems* where horses are left at an inn to be kept, the innkeeper, as such, has a right to detain them for their keeping, although the one who brought them there is not a guest. *Mason* v. *Thompson*, 9 Pick. (Mass.) 280; *Peet* v. *McGraw*, 25 Wend. 653.

§ 2. **Right to compensation.** That an innkeeper has a right to be reasonably compensated for the accommodation and entertainment furnished by him to his guests is a principle of law too well settled to need comment, or the citation of authorities. The next section shows the manner of securing this compensation to be promptly and fully paid. And although an innkeeper may claim a lien on his guest's goods for an amount in excess of his reasonable charges, yet the lien is good for the amount that is justly his due. *Allen* v. *Smith*, 12 C. B. (N. S.) 638.

§ 3. **Lien for charges.** An innkeeper has a lien for the amount of his reasonable charges on the goods of his guest, but not on the goods of his boarder. *Pollock* v. *Landis*, 36 Iowa, 651; *Willard* v. *Reinhardt*, 2 E. D. Smith (N. Y.), 148; *Ewart* v. *Stark*, 8 Rich. (S. C.) 423; *Hursh* v. *Byers*, 29 Mo. 469. And see *Welch* v. *Pullman Palace Car Co.*, 16 Abb. N. S. (N. Y.) 352, 357. And if he furnish in good faith entertainment to an infant without knowledge that the infant was acting without the consent of his guardian, he has a lien on the infant's baggage for the amount of his charges. *Watson* v. *Cross*, 2 Duvall (Ky.), 147. He has a lien for the entertainment of the servant, upon such property of the master as the servant brings with him to the inn. *Smith* v. *Keyes*, 2 N. Y. Sup. (T. & C.) 650. But where several persons travel together and put up together at an inn, the goods of one cannot be detained for the board of all. *Clayton* v. *Butterfield*, 10 Rich. Law (S. C.), 300.

An innkeeper cannot enforce his lien upon the baggage of his guest by sale without process of law. *Case* v. *Fogg*, 46 Mo. 44. And it has been held that an innkeeper's lien and his liability stand and fall together. *Ingalsbee* v. *Wood*, 36 Barb. (N. Y.) 452.

An innkeeper has no lien on the person of his guest, and cannot therefore detain him for any reckoning due. Still less has he any right to take any clothes off the person of his guest as a security for the same (*Sunbolf* v. *Alford*, 3 M. & W. 284; S. C., 1 H. & H. 13. See *Bumpus* v. *Maynard*, 38 Barb. 626); nor has he a lien for his keeping on a horse in his stable, unless he is placed there by a guest. *Binns* v. *Pigot*, 9 C. & P. 298; *Fox* v. *McGregor*, 11 Barb. 41; *Young* v. *Kimball*, 23 Penn. St. 193. And he has no lien as against the true owner, upon goods in possession of his guest, which are owned by a third party, unless there be charges on the specific article upon which the lien is claimed. *Domestic Sewing Machine Co.* v. *Watters*, 50 Ga. 573. In Wisconsin he has a lien even on the goods of a third party which are lawfully in the guest's possession. *Manning* v. *Hollenbeck*, 27 Wis. 202. See, also, *Snead* v. *Watkins*, 1 C. B. (N. S.) 267. If the guest is a mail contractor, who has stables and feed furnished for his horses which carry the mail, the innkeeper has no lien upon the horses if they are daily used in running the stages while carrying the mails. *Hickman* v. *Thomas*, 16 Ala. 666.

§ 4. **Power to restrict liability by notice.** The liability of an innkeeper is not affected by merely posting in the guest's room a notice declaring his liability to be limited by the non-observance of certain directions. *Bolwell* v. *Bragg*, 29 Iowa, 232; *Multby* v. *Chapman*, 25 Md. 310. But if a guest deposit an overcoat and the contents of his

pockets in a place other than that designated by the rule of the inn, which is reasonable, known to the guest and not specially waived, the innkeeper is not liable for the loss. *Fuller* v. *Coats*, 18 Ohio St. 343.

§ 5. **Limits and exceptions to liability.** Unless the relation of innkeeper and guest exist, the innkeeper is under no liability as such. *Ingalsbee* v. *Wood*, 36 Barb. (N. Y.) 452. An innkeeper is not liable for the clothing of a boarder, which may be stolen from the boarder's room without the innkeeper's fault, although it would be otherwise as to the clothes of a guest. *Manning* v. *Wells*, 9 Humph. 746. Where a regular boarder delivers valuables to an innkeeper for safe-keeping, the innkeeper is liable only as a depositary without reward. *Johnson* v. *Reynolds*, 3 Kans. 257.

The innkeeper is responsible only for his guest's baggage, and that term does not include merchandise or other valuables, such as silver knives, forks and spoons (*Pettigrew* v. *Barnum*, 11 Md. 434); and if the baggage of a guest is carried away by one whom the owner has allowed to exercise over it acts of ownership, without informing the innkeeper whose baggage it was, the innkeeper is not liable. *Kelsey* v. *Berry*, 42 Ill. 469.

ARTICLE V.

REMEDIES OF INNKEEPER.

Section 1. In general. An innkeeper may bring an action for the recovery of his compensation for the accommodation and entertainment he furnishes a guest. 1 Bouv. Law Dict. 714. And, like a common carrier, he is entitled to a right of lien upon the goods of the guest as a security for the payment of such compensation, and he may detain the goods for what is due to him for the lodging and entertainment provided for the guest until the entire debt is paid. *York* v. *Grindstone*, 1 Salk. 388.

But an innkeeper has no lien on the goods in possession of his guest, as against the true owner, unless there be charges upon the specific article on which the lien is claimed. *Domestic Sewing Machine Co.* v. *Watters*, 50 Ga. 573.

§ 2. **Lien for charges, how enforced.** An innkeeper has no right to enforce his lien on the baggage of a guest, by sale, without due process of law. *Case* v. *Fogg*, 46 Mo. 44. And a petition to enforce a lien on the baggage of a guest for board and lodging must allege that the petitioner is a tavern keeper; an averment that he is "landlord and proprietor" of the house is insufficient. *Southwood* v. *Myers*, 3 Bush (Ky.), 681; *Peet* v. *McGraw*, 25 Wend. 653.

ARTICLE VI.

REMEDIES FO GUEST.

Section 1. Action to enforce innkeeper's liability. An action may be maintained against an innkeeper to recover the value of personal property left in his charge by a guest and subsequently stolen. *Rockwell* v. *Proctor*, 39 Ga. 105; *People* v. *Willett*, 15 How. (N. Y.) Pr. 210; S. C., 6 Abb. Pr. 37; 26 Barb. 78. In such action, at common law, it must appear, 1st, that defendant kept an inn; 2nd, that the goods were lost at his inn; and 3rd, that at the time of the loss the relationship of innkeeper and guest existed between the defendant and the plaintiff. *Carter* v. *Hobbs*, 12 Mich. 52.

For the requisites of the petition under Swan & C. (Ohio) Stat. 1425, to recover of an innkeeper for lost baggage, see *Prescott* v. *Bruce*, 2 Cin. (Ohio) 58. An innkeeper is not liable in trover for property intrusted to him in the line of his business, unless an actual conversion is shown. *Hallenbake* v. *Fish*, 8 Wend. (N. Y.) 547.

A hotel guest, if he have property in his possession as a gratuitous bailee, and deliver it into the custody of the landlord, he may have an action in his own name against the landlord to recover for its loss. *Kellogg* v. *Sweeney*, 1 Lans. (N. Y.) 397.

§ 2. **Rule as to damages.** The remedies against an innkeeper for the loss of goods are similar to those against a common carrier (Jones on Bailm. 95); and the measure of damages would doubtless be the same; that is, the value of the goods at the time of their loss. Interest on such value might be allowed by way of damages. *Spar* v. *Welman*, 11 Mo. 230. As to damages for wrongfully turning a guest out of an inn, *ante*, 3, art. 2, § 1.

CHAPTER LXXXII.

INSURANCE.

TITLE I.

OF FIRE INSURANCE.

ARTICLE I.

NATURE OF INSURANCE.

Section 1. In general. Insurance is a contract, whereby one person undertakes to compensate another, if he shall suffer loss. It must, like other contracts, have a sufficient consideration. "All that is requisite to constitute such a contract is the payment of the consideration by the insured, and the promise of the insurer to pay the amount of the insurance, upon the happening of injury to the subject by a contingency contemplated in the contract." *Commonwealth* v. *Weatherbee*, 105 Mass. 160. It is applicable to every form of possible loss. It cannot justly be made a subject of profit to the insured, as it is in its nature only a contract of indemnity. If the insured has sustained no damage, the contract is not broken. *Wilson* v. *Hill*, 3 Metc. (Mass.) 69. It ought to furnish protection only against a real loss, and to the precise amount of that loss. *Kemp* v. *Vigne*, 1 T. R. 309; *Carpenter* v. *Providence Ins. Co*, 16 Pet. (U. S.) 503. It is a contract which, though different in its nature from all other contracts, is governed by the same principles which apply to other contracts. *Cornfoot* v. *Fowke*, 6 Mees. & Wels. 379. The contract being for indemnity against some peril, is conditional on the risk attaching. Where the subject is never put at risk, no premium is earned (*Stevenson* v. *Snow*, 3 Burr. 1237; *Tyrie* v. *Fletcher*, Cowp. 668); and if it has been paid, it must be repaid. But, if the risk has once attached, there is no apportionment of the premiums afterward. The contract is personal, and is not annexed to or transferable with the thing insured, except by special agreement. *Wilson* v. *Hill*, 3 Metc. (Mass.) 66; *Sadlers' Co.* v. *Badcock*, 2 Atk. 554; *Adams* v. *Rockingham Ins. Co.*,

29 Me. 292; *Alexandria* v. *Lawrence*, 10 Pet. (U. S.) 512. It is the loss which the person insured may sustain which is insured against, and when he parts with the thing insured, his liability to injury ceases, while the new owner can claim no indemnity, as he is a stranger to the contract. *Lynch* v. *Dalzell*, 4 Bro. Par. Cas. 431.

By special agreement the insurance may be made to run with the title. There may be several independent interests in the same property. *Carpenter* v. *Providence Ins. Co.*, 16 Pet. (U. S.) 501. Thus a mortgagee may insure, and if he receives the amount insured, the mortgagor can get no advantage from it, in the absence of special contract. *White* v. *Brown*, 2 Cush. (Mass.) 412; *Cushing* v. *Thompson*, 34 Me. 496; *Leeds* v. *Cheetham*, 1 Sim. 146; *Mildmay* v. *Folgham*, 3 Ves. Jr. 472; *Honore* v. *Lamar Ins. Co.*, 51 Ill. 409. Where the amount of indemnity is fixed by the agreement of the parties, the policy is called a valued one, and in this class are life, and most accident policies, but where the indemnity is to be measured by the amount of loss, as determined after its occurrence, the policy is an open one. May on Ins., § 7. There is always an element of chance involved. If the amount, time and nature of the loss were certain, the person in danger could provide his own indemnity. The uncertainty may be either in the time when the loss will occur, if it occurs at all, or in the amount of damage, or in both combined. In life insurance, for instance, the event, the death of the party insured, must occur, and there is no uncertainty about its nature, but the date is unknown. The person who has insured a risk may himself seek indemnity against the chance of loss which he has assumed, by reinsuring the risk. This is in theory a legitimate original insurance, but actually amounts to a transfer of part of the liability assumed. *Merry* v. *Prince*, 2 Mass. 176. The party who is originally insured is a stranger to this contract which binds the reinsurer to reimburse to the first insurer the loss which may occur to the subject insured to the extent agreed. *Hone* v. *Mutual Ins. Co.*, 1 Sandf. (N.Y.) 137; S. C., 2 N. Y. (2 Comst.) 235; *Strong* v. *Phœnix Ins. Co.*, 62 Mo. 289; 21 Am. Rep. 417. The reinsurer can make any defenses which are open to the insurer, but must pay him, whether he has paid, or is able to pay, the loss. *N. Y. Ins. Co.* v. *Protection Ins. Co.*, 1 Story (C. C.), 458; *Eagle Ins. Co.* v. *Lafayette Ins. Co.*, 9 Ind. 443; *Hone* v. *Mutual Ins. Co.*, 1 Sandf. (N. Y.) 137; S. C., 2 N. Y. (2 Comst.) 235. The reinsured must observe good faith with the reinsurer, and if he conceals material facts, he cannot enforce the contract. *Bowery Ins. Co.* v. *N. Y. Ins. Co.*, 17 Wend. (N. Y.) 359. If the insurer is not liable himself, he can recover nothing from the reinsurer, for no loss has come to him. *Eagle Ins. Co.* v. *Lafayette Ins. Co.*, 9 Ind. 443; *N. Y. Ins. Co.*

v. *Protection Ins. Co.*, 1 Story (U. S.), 458; *Delaware Ins. Co.* v. *Quaker City Ins. Co.*, 3 Grant's Cas. (Penn.) 71. As the contract is an aleatory one, where the equivalent consists in chances of gain or loss, and not a commutative one, in which the thing given, or the act done, is regarded as an exact equivalent of the money paid, it is possible for the insured to enter into separate contracts of insurance with several parties. This is called double insurance. *Australian Agricultural Ins. Co.* v. *Saunders*, L. R., 10 C. P. 668; 14 Eng. R. 501. But by the nature of the contract it is never a source of absolute gain to the insured, but only an indemnity, and therefore he can never collect more than his loss, but he may elect of which insurer he will take his indemnity. In case of double insurance, the several concurrent insurers are considered as identical in interest, and have a right to demand contribution between themselves, so that they may equitably share the loss. *Godin* v. *London Ass. Co.*, 1 Burr, 492; *Lucas* v. *Jefferson Ins. Co.*, 6 Cow. (N. Y.) 635; *Stacey* v. *Franklin Ins. Co.*, 2 W. & S. (Penn.) 506; *Newby* v. *Reed*, 1 W. Bl. 416; *Peoria Ins. Co.* v. *Lewis*, 18 Ill. 553; *Baltimore Ins. Co.* v. *Loney*, 20 Md. 20; *Sloat* v. *Royal Ins. Co.*, 49 Penn. St. 14; *Merrick* v. *Germania Ins. Co.*, 54 id. 277.

ARTICLE II.

CONTRACT; PARTIES; CONSTRUCTION.

Section 1. Form of the contract. Like all other contracts which are not required by statute to be in writing, the contract of insurance may be made by parol. *Dodd* v. *Gloucester Ins. Co.*, 120 Mass. 468; *Ins. Co.* v. *Colt*, 20 Wall. 560; *Ide* v. *Phœnix Ins. Co.*, 2 Biss. (C. C.) 333; *Mobile Ins. Co.* v. *McMillan*, 31 Ala. 711; *Dayton Ins. Co.* v. *Kelly*, 24 Ohio St. 345; 15 Am. Rep. 612; *Relief Ins. Co.* v. *Shaw*, 94 U. S. 574. Thus it is said in *McCulloch* v. *Eagle Ins. Co*, 1 Pick. (Mass.) 278, that if a contract be actually made, the mere want of a policy will not prevent a recovery. *Walker* v. *Met. Ins. Co.*, 56 Me. 371; *Ellis* v. *Albany Ins. Co.*, 50 N. Y. (5 Sick.) 402; 10 Am. Rep. 495. In *Sanborn* v. *Fireman's Ins. Co.*, 16 Gray, 448, HOAR, J., says: "No principle of the common law seems to require that this contract, any more than other simple contracts made by competent parties upon a sufficient consideration, should be evidenced by a writing. Upon principle, therefore, we can find no authority in courts to refuse to enforce an agreement which the parties have made, if sufficiently proved by parol testimony." In *Baptist Church* v. *Brooklyn Ins. Co.*, 19 N. Y. (5 Smith) 308, the court assert that to deny that

parol contracts of insurance are valid would be simply to affirm the incapacity of parties to contract, when no such incapacity exists, according to any rule of reason or of law. *Perkins* v. *Washington Ins. Co.*, 4 Cow. (N. Y.) 646; *Smith* v. *Odlin*, 4 Yeates (Penn.), 468; *Union Ins. Co.* v. *Commercial Ins. Co.*, 2 Curt. (C. C.) 524; S. C., 19 How. (U. S.) 318; *Hamilton* v. *Lycoming Ins. Co.*, 5 Penn. St. 339. And a parol contract will be valid, although the law requires all conditions to be printed on the face of the policy, and certain officers to sign all policies and contracts. *Henning* v. *U. S. Ins. Co.*, 2 Dill. (C. C.) 26; *contra*, *Same* v. *Same*, 47 Mo. 425; 4 Am. Rep. 332. In *Prince of Wales Ins. Co.* v. *Harding*, 1 E. B. & E. 183, where the act of incorporation provided that policies signed by the secretary should be binding on the company, it was held that the provision was for the protection of the shareholders, and imposed on the officers the duty of observing certain formalities. If they neglected these, they would be liable to the shareholders, but the contract would still be binding. *Collett* v. *Morrison*, 9 Hare, 162; *Baptist Church* v. *Brooklyn Ins. Co.*, 19 N. Y. (5 Smith) 305; *Constant* v. *Ins. Co.*, 3 Wall. Jr. (C. C.) 313; *Perry* v. *Mercantile Ins. Co.*, 8 Up. Can. 363. In other cases the mode prescribed by the charter is regarded as exclusive. *Cockerill* v. *Cincinnati Ins. Co.*, 16 Ohio, 148; *Lindauer* v. *Delaware Safety Ins. Co.*, 13 Ark. 461; *Ins. Co.* v. *McGillivray*, 9 Low Can. 488; *Henning* v. *N. Y. Ins. Co.*, 47 Mo. 430; 4 Am. Rep. 332. In some cases the same result may follow incidentally from other legislation. Thus it has been held that a parol contract would be an evasion of the stamp laws (*Morgan* v. *Mather*, 2 Ves. Jr. 18; *Western Mass. Ins. Co.* v. *Duffey*, 2 Kans. 347); or an express statute may require it. *Croghan* v. *Underwriters' Agency*, 53 Ga. 109. But a contract of insurance from year to year is not within the statute of frauds. *Walker* v. *Metropolitan Ins. Co.*, 56 Me. 371; *Baptist Church* v. *Brooklyn Ins. Co.*, 19 N. Y. (5 Smith) 308; *Sanborn* v. *Fireman's Ins. Co.*, 16 Gray (Mass.), 448. The verbal contract must contain the same essential elements which are included in the written policies. By uniform practice, however, all permanent contracts of insurance are reduced to written policies. *Cockerill* v. *Cincinnati Ins. Co.*, 16 Ohio, 148. But it is common to make preliminary parol contracts, by which the property is protected until the more formal policy is ready for delivery. *Fish* v. *Cottenet*, 44 N. Y. (5 Hand) 538; 4 Am. Rep. 715. In determining whether a complete and perfect contract has been made the circumstance that a policy in writing was contemplated and had not been executed would certainly be entitled to great weight. *Real Estate Ins. Co.* v. *Roessle*, 1 Gray (Mass.), 336. No particular form is necessary in a policy of insurance, provided its scope and meaning im-

port an insurance. *Kent* v. *Bird*, Cowp. 583; *Puller* v. *Glover*, 12 East, 124; *Roebuck* v. *Hammerton*, Cowp. 737. A promise to pay the loss must appear from the instrument itself. *Alchorne* v. *Saville*, 6 Moore, 202, *n*. Where it was declared that "the society was to pay," it was held enough. *Andrews* v. *Ellison*, 6 Moore, 199. A covenant to pay out of money raised by the first installments on the shares is a general covenant. *Pilbrow* v. *Atmospheric Railway*, 5 C. B. 440. These illustrations prove the importance of an accurately drawn contract, and it has become the uniform practice to embody every permanent contract of insurance in a policy. This contract should set out the names of the contracting parties, a consideration, a proper description of the subject-matter insured, the risk against which it is insured, the term for which it is insured, the amount of indemnity to be paid. It often, also, sets out the steps necessary to fix the liability after the loss occurs, and conditions as to the conduct of the insured toward the subject-matter insured. These provisions are not always in one paper. A part are often in the application for insurance, and the conditions are often on the back of the policy, but they are construed with the policy as one contract. *Worsley* v. *Wood*, 6 T. R. 710; *Routledge* v. *Burrell*, 1 H. Black. 254; *Holmes* v. *Charlestown Ins. Co.*, 10 Metc. (Mass.) 211. Policies are divided, according to the stipulations, with reference to the amount of indemnity, into valued, and open. In a valued policy, the maximum sum to be paid as indemnity is fixed. In an open policy, it is left to be adjusted in case of loss. Under the first, the sum agreed on is conclusive, in the absence of fraud, but under the second the amount of loss insured against must be proved. *Haigh* v. *De La Cour*, 3 Camp. 319; *Forbes* v. *Aspinall*, 13 East, 323; *Young* v. *Irving*, 9 Scott N. R. 752; *Alsop* v. *Com. Ins. Co.*, 1 Sumn. (C. C.) 451; *Carson* v. *Maine Ins. Co.*, 2 Wash. C. C. (U. S.) 468; *Holmes* v. *Charlestown Ins. Co.*, 10 Metc. (Mass.) 211; *Lycoming Ins. Co.* v. *Mitchell*, 48 Penn. St. 372; *Laurent* v. *Chatham Ins. Co.*, 1 Hall (N. Y.), 40; *Cushman* v. *Northwestern Ins. Co.*, 34 Me. 487. Overvaluation may be proof of fraud. *Miner* v. *Tagert*, 3 Binn. (Penn.) 204. It is a question of construction whether the policy is valued or open. In valued policies, the words "valued at" are often used, but any form which expresses the intention of the parties to fix the value will make the policy a valued one. *Laurent* v. *Chatham Ins. Co.*, 1 Hall (N. Y.), 40; *Wallace* v. *Ins. Co.*, 4 La. 289.

A reference to the application in which the value of the policy is set out may be enough. *Nichols* v. *Fayette Ins. Co.*, 1 Allen (Mass.), 63; *Phœnix Ins. Co.* v. *McLoon*, 100 Mass. 475; *Brown* v. *Quincy Ins. Co.*, 105 id. 396; 7 Am. Rep. 538. The same policy may be open as to one

article and valued as to another. *Post* v. *Hampshire Ins. Co.*, 12 Metc. (Mass.) 555. With reference to the interest of the insured, policies are divided into wager, and interest policies. A wager policy is one where the insured has no interest or risk. Such policies are against public policy, and any attempt to dispense by agreement with proof of interest is *prima facie* evidence that the policy is a wager policy. *Alsop* v. *Com. Ins. Co.*, 1 Sumn. (C. C.) 467. In an interest policy the insured has an interest and will be subjected to injury by a loss. *Williams* v. *Smith*, 2 Cai. (N. Y.) 13. This interest need not be a direct pecuniary one. Any right which may be enforced against the property, and is so connected with it that injury to it must cause the insurer loss, is insurable. *Rohrback* v. *Germania Ins. Co.*, 62 N. Y. (17 Sick.) 47; 20 Am. Rep. 451.

The duration of the policy may be for a fixed term or equal to the duration of the risk, and these policies are called in marine insurance, time and voyage policies; in life insurance, time and life policies. May on Ins., § 34

§ 2. **Parties to the contract.** Parties competent to enter into any other contract may, in general, make contracts of insurance on either side. These parties may be either individuals or societies. In mutual insurance, the members are, at once, themselves insured, and insurers of the other members. There are some disabilities. The subjects of states at war cannot make a valid contract of insurance. This is put upon the ground that no subject can be permitted to contract to do any thing which may be detrimental to the interests of his own country, and it is considered that any contract which may foster or protect the commerce or business of an enemy is so opposed. *The Hoop*, 1 Rob. 196; *The Emulous*, 1 Gall. 571; *Griswold* v. *Waddington*, 16 Johns. (N. Y.) 438; *Gamba* v. *LeMesurier*, 4 East, 407; *Furtado* v. *Rodgers*, 3 Bos. & Pul. 191. Although the contract was valid at its inception, yet a subsequent war will suspend it. *Ex parte Boussmaker*, 13 Ves. Jr. 71. The principle has been extended to life insurance, and forbids the insurer to indemnify a policy-holder who has lost his life, health, or property in the service of the enemy, whether the loss be excepted in the policy or not. *Ex parte Lee*, 13 Ves. Jr. 64. In such case, however, where a valid and pre-existing contract may be performed by a single act, or by periodical acts between which there is no continuity of performance, such as payment of premiums, so that supervening war does not disable them from performing their respective duties, nor defeat the object of the contract, a suspension of the remedy during the war is the only proper effect. The contract, not the performance, continues. *New York Ins. Co.* v. *Clopton*, 7 Bush (Ky.), 179; 3 Am. Rep. 290;

Hamilton v. *Mutual Ins. Co.*, 9 Blatchf. (C. C.) 234; *Manhattan Ins. Co.* v. *Warwick*, 20 Gratt. (Va.) 614; 3 Am. Rep. 218; *Semmes* v. *City Ins. Co.*, 6 Blatchf (C. C.) 445; S. C., 13 Wall. (U. S.) 159. Any intercourse inconsistent with the state of war is prohibited; and this includes any act or contract which tends to increase the resources of the enemy, and all intercourse of a commercial nature. This does not include payment to an agent of the insurer residing in the country of the insured. *Kershaw* v. *Kelsey*, 100 Mass. 561; *New York Ins. Co.* v. *Clopton*, 7 Bush (Ky.), 179; 3 Am. Rep. 290; *Sands* v. *New York Ins. Co.*, 59 Barb. (N. Y.) 556; *Manhattan Ins. Co.* v. *Warwick*, 20 Gratt. (Va.) 614; 3 Am. Rep. 218. Besides the insurer and insured, there may be other parties interested in the policy. Thus fire insurance policies may be made payable to the mortgagee to the extent of his interest. *Jackson* v. *Farmers' Ins. Co.*, 5 Gray (Mass.), 52; *Turner* v. *Quincy Ins. Co.*, 109 Mass. 568. Other parties may gain an interest in the contract after its inception by an assignment of the policy to them. It is not necessary that both parties should be set out in the contract by name. Where the parties in interest as insured are uncertain or fluctuating, or numerous, it is common to make it for the benefit "of whom it may concern," and then any party proving an interest may recover.

§ 3. **Construction of the contract.** The contract of insurance is governed by the same rules of construction which are used in the interpretation of other contracts. *Aurora Ins. Co.* v. *Eddy*, 49 Ill. 106; *Wells* v. *Pacific Ins. Co.*, 44 Cal. 397. As contracts of insurance are essentially commercial contracts, usage has always been of great weight in their interpretation. They are, however, to be construed according to the sense and meaning of the terms used. If these are clear and unambiguous, the courts will not admit parol evidence of any kind to control them. The terms used are to be understood in their plain, ordinary, and popular sense, unless by some usage of trade acquired in respect to the subject-matter, a peculiar sense is given to them, or unless the connection in which they are used plainly indicates that the intention of the parties requires some special and peculiar meaning. *Crousillat* v. *Ball*, 3 Yeates (Penn.), 375; *Robertson* v. *French*, 4 East, 135. The language is to receive a reasonable interpretation. Its intent and substance, as derived from the language used, should be regarded. *Turley* v. *North American Ins. Co.*, 25 Wend. 374. The difference in the rules of interpretation, as applied to insurance, has its grounds in the nature of the contract and the relative situation of the parties, matters which are regarded in the interpretation of every contract. Thus it is said that it is to be construed largely for the benefit of trade and for the insured. *Tiernay* v. *Ethrington*, 1 Burr. 348. Having indem-

nity for its object, the contract is to be construed liberally to that end, and it is presumably the intention of the insurer that the insured shall understand that, in case of loss, he is to be protected to the full extent to which any fair interpretation can carry the contract. *Dow* v. *Hope Ins. Co.*, 1 Hall (N. Y.), 174; *Riggin* v. *Patapsco Ins. Co.*, 7 Harr. & J. (Md.) 279. In the end it is the interest of both parties that the greatest indemnity shall be given, and that technical defenses shall not prevail. The rule then is that where two interpretations equally fair may be given, that which gives the greater indemnity shall prevail. So conditions and provisos will be strictly construed against the insurer, because they tend to impair the protection sought by the principal contract. *Hoffman* v. *Ætna Ins. Co.*, 32 N. Y. 405; *Ins. Co.* v. *Wright*, 1 Wall. (U. S.) 456; *Montgomery* v. *Fireman's Ins. Co.*, 16 B. Monr. (Ky.) 427. The whole instrument must be read together, and clauses apparently inconsistent must be moulded to support the main end in view. *Merchants' Ins. Co.* v. *Edmond*, 17 Gratt. (Va.) 138. Any interpretation is to be shunned which will conflict with that end. The rule is fully established that the policy must in all cases be construed in favor of the insured. *Westfall* v. *Hudson River Ins. Co.*, 2 Duer (N. Y.), 490. As the insurers have the power to choose their own language, and to insert all conditions and provisos needed to protect themselves against fraud or unjust claims, the language actually used will be construed against them. *Cropper* v. *Western Ins. Co.*, 32 Penn. St. 351; *Nicoll* v. *American Ins. Co.*, 3 Woodb. & M. (C. C.) 529. The words of a promise with its exceptions and qualifications are to be considered as those of the promisor, but the language used in any statement or representation on which such promise is founded are those of the promisee. Where such statement is made in answer to questions proposed by the promisor, these questions are to be construed against him. *Cropper* v. *Western Ins. Co.*, 32 Penn. St. 351; *Ætna Ins. Co.* v. *Jackson*, 16 B. Monr. (Ky.) 242; *Bartlett* v. *Union Ins. Co.*, 46 Me. 500; *Wilson* v. *Conway Ins. Co.*, 4 R. I. 141; *Ins. Co.* v. *Wilkinson*, 13 Wall. (U. S.) 222. If notice of additional insurance, and the written assent to it of the insurers be required, an acknowledgment in writing that notice has been received, without more, will be construed as an approval. *Potter* v. *Ontario Ins. Co.*, 5 Hill (N. Y.), 147; *Robertson* v. *French*, 4 East, 130. Where a proposal for insurance is made part of the policy, and is affirmed to be "correct and true throughout," and stipulates that any fraudulent concealment or designedly untrue statement shall avoid the policy, the court held that an untrue statement honestly made did not avoid the policy. *Fowkes* v. *Manchester Ins. Co.*, 3 Best. & Sm. 917.

It is a general rule, in all contracts partly written and partly printed, that the written words shall receive the most weight in matters of interpretation, as they are more directly the expression of the minds of the parties, and less liable to error through inadvertence. *Robertson* v. *French*, 4 East, 136. The written clauses supersede and control any printed words which would in their literal import be inconsistent with them. Vol. I, 127; *Delonguemare* v. *Tradesman Ins. Co.*, 2 Hall (N. Y.), 622; *Coit* v. *Commercial Ins. Co.*, 7 Johns. (N. Y.) 385; *Blake* v. *Exchange Ins. Co.*, 12 Gray (Mass.), 265. It is a general rule of the law that conditions subsequent are not favored, and so warranties, a breach of which will work a forfeiture, are strictly construed. Thus, where the application, in answer to questions, stated that the building was used for hardware, and occupied by one tenant, when in truth the second floor was used for clothing, and the third for lodgings, and the representation in the application was declared to be a warranty, yet it was held, that false representations as to matters independent of the property insured, which had not contributed to the loss, would not avoid the policy, and it was held valid. *Howard Ins. Co.* v. *Cormick*, 24 Ill. 455. Where the insurance was upon a stock of goods, and the policy provided that it should be void if the premises were used for keeping therein oil and cotton, it was held that this clause was only applicable in case a building was insured, and then only where the building was chiefly used for the forbidden purposes, and not for the incidental keeping of small quantities of such goods; and increase of risk means permanent or habitual increase. *Leggett* v. *Ætna Ins. Co.*, 10 Rich. L. (S. C.) 202. So, an alteration in the situation of articles insured is not an alteration of the "premises." *Robinson* v. *Mercer Ins. Co.*, 3 Dutcher (N. J.), 136. Where there was a warranty that the building, which was a mill, was run by day only, the running of the engine alone at night is no breach. *Mayall* v. *Mitford*, 6 Ad. & El. 670; *Hide* v. *Bruce*, 3 Doug. 213; *Peoria Ins. Co.* v. *Lewis*, 18 Ill. 553. Usage may control the contract in cases where evidence of it is admissible. For instance, that it is customary to use camphene in printing offices to clean type (*Harper* v. *City Ins. Co.*, 1 Bosw. [N. Y.] 520; 22 N. Y. [8 Smith] 441); that benzole is used in patent leather factories (*Citizens' Ins. Co.* v. *McLaughlin*, 53 Penn. St. 485); that among manufacturers "room" means loft, whether divided by partitions or not (*Daniels* v. *Hudson River Ins. Co.*, 12 Cush. [Mass.] 416; that a house built in a particular way is "filled in with brick" (*Fowler* v. *Ætna Ins. Co.*, 7 Wend. [N. Y.] 270), and so of the meaning of any term which has in any trade a limited or technical meaning other than its popular one (*Wall* v. *Howard Ins. Co.*, 14 Barb. [N. Y.] 383; 7 N.

Y. [3 Seld.] 370). A distinct provision cannot be added by usage. Thus a usage to require notice to the insurer, in case of increase of risk, is bad. *Stebbins* v. *Globe Ins. Co.*, 2 Hall [N. Y.], 632), or to pay only a proportional part of the loss (*Hone* v. *Safety Ins. Co.*, 1 Sandf. [N. Y.] 137; S. C., 2 Comst. [N. Y.] 235), or to except a certain night when a watch was agreed to be kept generally. *Glendale Co.* v. *Protection Ins. Co.*, 21 Conn. 19; *Ripley* v. *Ætna Ins. Co.*, 30 N. Y. 136. But the words "keeping a watch" and loss "by fire by lightning," were allowed to be explained. *Crocker* v. *People's Ins. Co.*, 8 Cush. (Mass.) 79; *Babcock* v. *Montgomery Ins. Co.*, 6 Barb. (N. Y.) 637; S. C., 4 Comst. (N. Y.) 326.

ARTICLE III.

INSURABLE INTERESTS.

Section 1. In general. As we have seen, it is against public policy, and is expressly forbidden for a person to insure that in which he has no interest. Such an insurance would be a direct inducement to the insured to destroy the thing insured. And, where the insurance is beyond the amount of the interest at stake, the effect is the same, for, although the amount of the loss only can be properly recovered, there will be a hope of getting more. It is also in its nature a gambling contract where the party has no real interest at stake, and the courts will not give relief upon it. *King* v. *State Ins. Co.*, 7 Cush. (Mass.) 11; *Fowler* v. *N. Y. Indemnity Ins. Co.*, 26 N. Y. (11 Smith) 422; *Bersch* v. *Sinnissippi Ins. Co.*, 28 Ind. 64; *Sawyer* v. *Mayhew*, 51 Me. 398; *Sweeny* v. *Franklin Ins. Co.*, 20 Penn. St. 337. But see *Trenton Ins. Co.* v. *Johnson*, 24 N. J. 576; *Mowry* v. *Home Ins. Co.*, 9 R. I. 346. Such an insurance is rather ineffectual for want of an essential element of the contract, than void for immorality, and it will not taint any other contract which may be joined with it. The policy remains good for so much as is supported by a legitimate insurable interest. May on Ins., § 74. This may, however, depend upon the terms of the contract, for if the matter is made a warranty, a breach as to any part may make the whole contract void. *Day* v. *Charter Oak Ins. Co.*, 51 Me. 91. But where the part as to which the policy failed was clearly separable from the rest it would seem that it would be simply surplusage. If the insured parts with his interest, the contract ceases (*Hidden* v. *Slater Ins. Co.*, 2 Cliff. [C. C.] 266), but a partial sale will not have that effect. *Manley* v. *Ins. Co. of North America*, 1 Lans. (N. Y.) 20.

§ 2. **What is such an interest.** The contract may be entered into to protect the insured in relation to any event, act or property which

bear such a relation to him that by any chance to be reasonably feared, it can have a bearing on his future pecuniary condition, or where any loss which can be compensated by money can occur to him (*Fenn* v. *N. O. Ins. Co.*, 53 Ga. 578), or to protect any right which may be enforced against the property, and which is so connected with it, that injury to it must cause him loss. *Rohrbach* v. *Germania Ins. Co.*, 62 N. Y. (17 Sick.) 47; 20 Am. Rep. 451. The thing insured may have neither a corporeal existence, nor a market value, and only a potential being, for it is the owner who is insured, and the loss to him which is provided against; when, therefore, he ceases to be exposed to loss, the contract ceases. *Hidden* v. *Slater Ins Co.*, 2 Cliff. (C. C.) 266. But the interest must not be an immoral or illegal one. *Mount* v. *Waite*, 7 Johns. (N. Y.) 434; *Lord* v. *Dall*, 12 Mass. 115. There need be no present right of property. *Columbian Ins. Co.* v. *Lawrence*, 2 Pet. (U. S.) 25. But the act, event or property must be so connected with the insured, that a loss to him can be made out. *Warren* v. *Davenport Ins. Co.*, 31 Iowa, 465; 7 Am. Rep. 160; *Rohrbach* v. *Germania Ins. Co.*, 1 N. Y. Sup. (T. & C.) 339; S. C., 62 N. Y. (17 Sick.) 47; 20 Am. Rep. 451. Expected profits from property in which the insured has an interest may be insured. *Sun Fire Office* v. *Wright*, 3 N. & M. 819; S. C., 1 Ad. & El. 621; *Putnam* v. *Mercantile Ins. Co.*, 5 Metc. (Mass.) 386; *Loomis* v. *Shaw*, 2 Johns. Cas. (N. Y.) 36; *Niblo* v. *N. A. Ins. Co.*, 1 Sandf. (N. Y.) 551; *Leonarda* v. *Phœnix Ins. Co.*, 2 Rob. (La.) 131. The profits may be in the future, as from a crop not yet sown, but then the contract begins *in futuro*. *Grant* v. *Parkinson*, 3 Bos. & Pul. 85, *n*. So if the insured has only a right to purchase that from which the profits are expected, he may yet insure, as in case of an election to take a cargo to arrive. *French* v. *Hope Ins. Co.*, 16 Pick. (Mass.) 397. But if the time of election does not come, as where there is a stoppage *in transitu*, the insurance does not attach. *Clay* v. *Harrison*, 10 Barn. & Cr. 99. Future products in the course of business may be insured. *Sawyer* v. *Dodge Co. Ins. Co.*, 37 Wis. 503. A mortgagee has an insurable interest in the estate while his debt is unpaid, and to the amount of it. *Carpenter* v. *Washington Ins. Co.*, 16 Pet. (U. S.) 495; *Kellar* v. *Merchants' Ins. Co.*, 7 La. Ann. 29; *Addison* v. *Louisville Ins. Co.*, 7 B. Mour. (Ky.) 470; *Fox* v. *Phœnix Ins. Co.*, 52 Me. 333. So of executors. *Phelps* v. *Gebhard Ins. Co.*, 9 Bosw. (N. Y.) 404; *Herkimer* v. *Rice*, 27 N. Y. (13 Smith) 163; *Ins. Co.* v. *Chase*, 5 Wall. (U. S.) 509. Of sheriffs in charge of property attached. *White* v. *Madison*, 26 N. Y. (12 Smith) 117. Of consignees, carriers and supercargoes. *Deforest* v. *Fulton Ins. Co.*, 1 Hall (N. Y.), 84; *Waters* v. *Monarch Ins. Co.*, 5 El. & Bl. 870;

Ætna Ins. Co. v. *Jackson*, 16 B. Monr. (Ky.) 242; *Robinson* v. *N. Y. Ins. Co.*, 2 Caines (N.Y.), 357; *Shaw* v. *Ætna Ins. Co.*, 49 Mo. 578; 8 Am. Rep. 150; *Hough* v. *People's Ins. Co.*, 36 Md. 398. Of captors. *Stockdale* v. *Dunlop*, 6 Mees. & W. 224. Of pledgees, innkeepers, factors, wharfingers, pawnbrokers, warehousemen, and, generally, persons charged by law, custom, or contract with the property of others, or having the right to protect the property, even though not bound to do so, or who will receive benefit from its continued existence, whether they have lien, title or possession or not. *Eastern Railroad* v. *Relief Ins. Co.*, 98 Mass. 420. A lawful possession, in most cases, gives a sufficient interest. *Sutherland* v. *Pratt*, 11 Mees. & W. 296; *Barclay* v. *Cousins*, 2 East, 544; *Tuckerman* v. *Home Ins. Co.*, 9 R. I. 414; *Bonham* v. *Iowa Central Ins. Co.*, 25 Iowa, 328.

Many persons may have separate insurable interests in the same property. Thus, the mortgagor, as well as the mortgagee, may insure, so long as he has any right to redeem the property. *Strong* v. *Manufacturers' Ins. Co.*, 10 Pick. (Mass.) 40; *Columbian Ins. Co.* v. *Lawrence*, 2 Pet. (U. S.) 25; *Franklin Ins. Co.* v. *Findlay*, 6 Whart. (Penn.) 483; *Traders' Ins. Co.* v. *Robert*, 9 Wend. (N. Y.) 404. The owner of a lease may insure. *Niblo* v. *N. A. Ins. Co.*, 1 Sandf. (N. Y.) 551; *Fletcher* v. *Com. Ins. Co.*, 18 Pick. (Mass.) 419; *Tongue* v. *Nutwell*, 31 Md. 302. The landlord and the tenant have each an insurable interest. *Ely* v. *Ely*, 80 Ill. 532. So has a tenant by the curtesy (*Franklin Ins. Co.* v. *Drake*, 2 B. Monr. [Ky.] 47; *Abbott* v. *Hampden Ins. Co.*, 30 Me. 414; *Harris* v. *York Ins. Co.*, 50 Penn. St. 341; *Goulstone* v. *Royal Ins. Co.*, 1 F. & F. 276); or the holder of a bond for a deed of real estate (*Ayres* v. *Hartford Ins. Co.*, 17 Iowa, 176); or one who has erected buildings under a parol contract of sale (*Southern Ins. Co.* v. *Lewis*, 42 Ga. 587); or a disseizor (*Curry* v. *Com. Ins. Co.*, 10 Pick. [Mass.] 535); or a mortgagor, even after foreclosure, while his liability on the mortgage debt continues. *Buffalo Works* v. *Sun Ins. Co.*, 17 N. Y. (3 Smith) 401; *New England Ins. Co.* v. *Wetmore*, 32 Ill. 221; *Waring* v. *Loder*, 53 N. Y. (8 Sick.) 581; *Williams* v. *Roger Williams Ins. Co.*, 107 Mass. 377; 9 Am. Rep. 41. Successive mortgagees may each insure. *Fox* v. *Phœnix Ins. Co.*, 52 Me. 333. Any tenant has an insurable interest. *Lawrence* v. *St. Marks Ins. Co.*, 43 Barb. (N. Y.) 479; *Mitchell* v. *Home Ins. Co.*, 32 Iowa, 421. So has a landlord in the goods of his tenant liable to distress. *Columbia Ins. Co.* v. *Cooper*, 50 Penn. St. 331. So it seems has any one who holds goods under a claim of right, even though he may be liable for their conversion. *New York* v. *Brooklyn Ins. Co.*, 41 Barb. (N. Y.) 231. A lessor has an insurable interest, though the tenant can

remove the buildings during the tenancy. *New York* v. *Exchange Ins. Co.*, 9 Bosw. (N. Y.) 424; *Miltenberger* v. *Beacom*, 9 Penn. St. 198. So have stockholders in the corporate property (*Warrin* v. *Davenport Ins. Co.*, 31 Iowa, 464; 7 Am. Rep. 160); or a partner in the firm goods (*Manhattan Ins. Co.* v. *Webster*, 59 Penn. St. 227; *Converse* v. *Citizens' Ins. Co.*, 10 Cush. [Mass.] 37); or even a retiring partner, while any liability remains. *Phœnix Ins. Co.* v. *Hamilton*, 14 Wall. (U. S.) 504. An equitable title (*Coursin* v. *Penn. Ins. Co.*, 46 Penn. St. 323); or an incomplete title, as that of one who has a contract of sale, even though he could not enforce it, if resisted, can be insured. *Ætna Ins. Co.* v. *Tyler*, 16 Wend. (N. Y.) 385; *Columbian Ins. Co.* v. *Lawrence*, 2 Pet. (U. S.) 25; *Smith* v. *Bowditch Ins. Co.*, 6 Cush. (Mass.) 448; *Milligan* v. *Equitable Ins. Co.*, 16 Up. Can. Q. B. 314; *Ætna Ins. Co.* v. *Miers*, 5 Sneed (Tenn.), 139. So where the title is void as against creditors (*Lerow* v. *Wilmarth*, 9 Allen [Mass.], 382); or by the assignee in bankruptcy. *Marks* v. *Hamilton*, 7 Exch. 323; *Goulstone* v. *Royal Ins. Co.*, 1 F. & F. 276. One who has a lien on real estate for labor can insure (*Franklin Ins. Co.* v. *Coates*, 14 Md. 285; *Carter* v. *Humboldt Ins. Co.*, 12 Iowa, 287; *Longhurst* v. *Star Ins. Co.*, 19 id. 364); or a builder who is not to be paid till the house is finished. *Protection Ins. Co.* v. *Hall*, 15 B. Monr. (Ky.) 411. An insurable interest in property for whose destruction they may be liable, is given to railroads, in some States. *Chapman* v. *Atlantic Railroad*, 37 Me. 92; *Hooksett* v. *Concord Railroad*, 38 N. H. 242; *Eastern Railroad* v. *Relief Ins. Co.*, 98 Mass. 420. One whose goods are attached and in possession of a sheriff (*Franklin Ins. Co.* v. *Findlay*, 6 Whart. [Penn.] 483); or, a receiptor for goods attached, can insure. *Fireman's Ins. Co.* v. *Powell*, 13 B. Monr. (Ky.) 312. The general rule is that the insured must have an interest, at the time both of insurance and of loss. *Lynch* v. *Dalzell*, 3 Bro. P. C. 431; *Howard* v. *Albany Ins. Co.*, 3 Den. (N. Y.) 301; *Tallman* v. *Atlantic Ins. Co.*, 3 Keyes, 87; 4 Abb. Ct. App. 345. In *Cockerell* v. *Com. Ins. Co.*, 16 Ohio, 148, it was said that the interest must be continuous, and that a sale and repurchase terminated the contract, but in *Worthington* v. *Bearse*, 12 Allen, 382, the court held the contrary.

§ 3. **What is not such an interest.** Policies made for the benefit of persons who have no interest in the property, or event, which constitutes the subject, are now almost universally held void. May on Ins., § 75. Such interest, to support an insurance, must be a clear, substantial, vested pecuniary interest, and not a mere expectancy, without any vested right. Such a connection must be established between the subject-matter insured, and the party in whose behalf the insurance has

been effected, as may be sufficient to make it evident that a loss will result to him from the occurrence of an injury to it. *Warren* v. *Davenport Ins. Co.*, 31 Iowa, 465; 7 Am. Rep. 160. The mere naked expectation of acquiring a trust or charge of property, without any present right, is not enough. There can be no insurable interest where there is no right in the property, or a right out of the property, derivable by virtue of a contract relative thereto, which in either case may be lost by the contingency insured against, and an expectation of a grant, trust or possession, however well founded, is not insurable. *Craufurd* v. *Hunter*, 8 T. R. 13; *Lucena* v. *Craufurd*, 3 Bos. & Pul. 75; S. C., 5 id. 270; S. C., 1 Taunt. 324; *Routh* v. *Thompson*, 11 East, 428. After a stoppage *in transitu* for insolvency of the consignee, he has no insurable interest. *Clay* v. *Harrison*, 10 Barn. & C. 99. A mere intruder on land has no insurable interest in buildings which he erects thereon. *Sweeny* v. *Franklin Ins. Co.*, 20 Penn. St. 337. A general lien, such as is given in some States against judgment debtors, and which attaches first to their personal property, and then to their real estate, does not enable the judgment creditor to insure. *Grevemeyer* v. *Southern Ins. Co.*, 62 Penn. St. 340; 1 Am. Rep. 420; *Foster* v. *Van Reed*, 5 Hun (N. Y.), 321. Where the only right of the insurer is under a contract which he cannot enforce, either at law or in equity, he cannot insure. Such are cases of a verbal purchase of goods to arrive, to be paid for if they arrive (*Stockdale* v. *Dunlop*, 6 Mees. & W. 224); of a mortgage by the master of a vessel which he had no power to make (*Stainbank* v. *Fenning*, 11 C. B. 51), or a verbal contract for the purchase of land. May on Ins., § 96. Where the goods had been sold and paid for, but the insured, who was the vendor, still held the wharfinger's warrant for the purpose of paying certain charges, he had no interest. *North British Ins. Co.* v. *Moffat*, L. R., 7 C. P. 25; 1 Eng. Rep. 80. In *Philips* v. *Knox Co. Ins. Co.*, 20 Ohio, 174, the fact that the insured was the sole stockholder in the company whose goods were insured were not enough. The purchaser of hay from lessees of a farm who have covenanted not to sell, has no interest, though in possession. *Heald* v. *Builders' Ins. Co.*, 111 Mass. 38.

ARTICLE IV.

INSURANCE AGENTS.

Section 1. In general. As at present conducted, the contract of insurance is ordinarily made, not directly by the parties, but through the intervention of an agent. The general principles upon which the

question relating to the powers and duties of these agents are determined belong to the law of agency. But many of these questions arise in a form peculiar to this subject, and are best treated here. These agents may be the representatives of either party, or each party may have its agent. In some cases the agent may be, for certain purposes, the agent of one, and, for others, of the other. It is also sometimes made a stipulation of the contract that the agent shall be the agent of the insured, and not of the insurer. *DeLancy* v. *Rockingham Ins. Co.*, 52 N. H. 589; *Rohrbach* v. *Germania Fire Ins. Co.*, 62 N. Y. (17 Sick.) 47; *Alexander* v. *Germania Fire Ins. Co.*, 66 N. Y. (21 Sick.) 464. But he may be nevertheless the agent of the insurers. *Masters* v. *Madison Co. Ins. Co.*, 11 Barb. (N. Y.) 624; *Rowley* v. *Empire Ins. Co.*, 4 Abb. Ct. App. 131; 3 Keyes, 557. *Columbia Ins. Co.* v. *Cooper*, 50 Penn. St. 331. If the insurance is effected by an agent of the insured, the questions arising are in general fully settled by the ordinary principles of the law of agency. The agent must have authority to effect the insurance. Where general authority for this purpose is given it will include power to do all acts necessary to the purpose, such as making the necessary representations, signing the application, and accepting the policy. The principal will be chargeable with any error or wrong of the agent in the conduct of the business (May on Ins., § 122; *Smith* v. *Empire Ins. Co.*, 25 Barb. [N. Y.] 497); and must bear the consequences even of his agent's fraud. *Fitzherbert* v. *Mather*, 1 T. R. 12; *Nicoll* v. *American Ins. Co.*, 3 Woodb. & M. (C. C.) 529; *Carpenter* v. *American Ins. Co.*, 1 Story (C. C.), 57; *Draper* v. *Charter Oak Ins. Co.*, 2 Allen (Mass.), 569. But he is not liable for matter untrue and fraudulent, inserted in the application by the agent of the insurer. *Ryan* v. *World Ins. Co.*, 41 Conn. 168; 19 Am. Rep. 490. The insured may also make other persons his agents, for a limited purpose by referring to them for information. He is bound by the answers they give, so far as he has agreed that they may be questioned, and if it is incorrect, he must suffer. *Sweet* v. *Fairlie*, 6 C. & P. 1; *Huckman* v. *Fernie*, 3 M. & W. 505. Thus the answers of the surgeon in his report, to which the application for life insurance refers, are treated as if they were those of the applicant. *Smith* v. *Ætna Ins. Co.*, 49 N. Y. (4 Sick.) 211. In *Wheelton* v. *Hardisty*, 8 El. & B. 232, it is held that the insured shall not be charged with any misrepresentation of the person referred to, unless the policy contains an express condition to that effect. A general authority to insure gives no power to insure in a mutual company, where the principal would become chargeable with liability for the losses of others. *White* v. *Madison*, 26 N. Y. (12 Smith) 117. The agent

is responsible to his principal for the proper discharge of the authority intrusted to him, whether he receives compensation or not (*Wilkinson* v. *Coverdale*, 1 Esp. 75; *Smith* v. *Lascelles*, 2 T. R. 187); as for effecting insurance with irresponsible parties. *Hurrell* v. *Bullard*, 3 F. & F. 445. The measure of damages would be the amount which the insured could have recovered if the agent had performed his duty faithfully. *Smith* v. *Price*, 2 F. & F. 748. The surveyor of a mutual company who wrote the application is the agent of the insured. *Susquehanna Ins. Co.* v. *Perrine*, 7 W. & S. (Penn.) 348. The master of a ship has no authority to give a premium note for insurance. *Adams* v. *Pittsburg Ins. Co.*, 76 Penn. St. 411.

§ 2. **Powers of insurance agents.** The agent's authority is determined, not by private instructions from his principal, of which the party dealing with him has no notice, but either by the instructions actually communicated, or by the nature of the business intrusted to the agent, and of the situation in which he is placed. *Markey* v. *Mutual Benefit Ins. Co.*, 103 Mass. 78; *Lungstrass* v. *German Ins. Co.*, 57 Mo. 107; *Keenan* v. *Mo. State Ins. Co.*, 12 Iowa, 126; vol. I, 221. Thus, if he is intrusted with the execution of certain business, he has authority to do every thing necessary to that end. If he is put in possession of an office, he is enabled to do whatever business his principal has represented will be done there. *Bebee* v. *Hartford Ins. Co.*, 25 Conn. 51; *Lycoming Ins. Co.* v. *Schollenberger*, 44 Penn. 259; *Beal* v. *Park Ins. Co.*, 16 Wis. 241; *Davenport* v. *Peoria Ins. Co.*, 17 Iowa, 276. If the agency to which he is appointed has, by custom and general understanding, a certain scope, his authority has the same extent, unless there is notice of a change. Thus, the possession of blank policies, and renewal receipts, is evidence of a general authority to do every thing necessary to their issue. *Carroll* v. *Charter Oak Ins. Co.*, 40 Barb. (N. Y.) 292; 4 Abb. Ct. App. 316; 10 Abb. (N. S.) 166; *Ætna Ins. Co.* v. *Maguire*, 51 Ill. 342. If the president of an insurance company is authorized to adjust and pay losses, he may indorse and deliver notes held by the company. *Baker* v. *Cotter*, 45 Me. 236. A secretary, authorized to answer all communications in behalf of the company, may bind the company by admissions as to the sufficiency of the proofs of loss. *Troy Ins. Co.* v. *Carpenter*, 4 Wis. 20; *Imperial Ins. Co.* v. *Murray*, 13 Penn. St. 73. Authority to settle the terms on which a risk may be changed, gives a right to waive a forfeiture caused by a change in the risk. *North Berwick Co.* v. *N. E. Ins. Co.*, 52 Me. 336; *Viele* v. *Germania Ins. Co.*, 26 Iowa, 9. As a general rule, agents of stock companies have a larger power in fixing the terms of the contract than those of mutual companies, as in the

latter it is necessary that there should be a substantial uniformity in all the policies. *Brewer* v. *Chelsea Ins Co.*, 14 Gray (Mass.), 203.

The insurance agents act mainly in soliciting insurance, receiving and forwarding the application of the insured, delivering the policy to him, and receiving the premiums. In soliciting insurance, he is governed by the same rules which apply to other persons who sell goods. He has power to state all facts concerning the insurers which are necessary to induce the owner of the property to insure with them. *Fogg* v. *Griffin*, 2 Allen (Mass.), 1; *Jones* v. *Dana*, 24 Barb. (N. Y.) 395. In matters of opinion, he may exaggerate. In matters equally open to both, he cannot be held for his statements. *Woodbury Bank* v. *Charter Oak Ins. Co.*, 31 Conn. 517; *Beal* v. *Park Ins. Co.*, 16 Wis. 241; *Lycoming Ins. Co.* v. *Schollenburger*, 44 Penn. St. 259. When the contract is decided on, he may put in form all necessary preliminary papers, and transmit them, when the course of business requires it, to the insurer. The general agent at this point has power to determine the amount of the risk, the conditions of insurance, and the premium. *Gloucester Manuf. Co.* v. *Howard Ins. Co.*, 5 Gray (Mass.), 497; *Brockelbank* v. *Sugrue*, 5 C. & P. 21. In doing this, he may modify the printed terms of the policy. *Hotchkiss* v. *Germania Ins. Co.*, 5 Hun (N. Y.), 90. He may insure property situated beyond the limits stated in his commission. *Lightbody* v. *N. A. Ins. Co.*, 23 Wend. (N. Y.) 18; *Ætna Ins. Co.* v. *Maguire*, 51 Ill. 342. An agent may give a right of recovery of the full value to an insurance by a partner in his own name of the goods of the firm. *Manhattan Ins. Co.* v. *Webster*, 59 Penn. St. 227; *Aurora Ins. Co.* v. *Eddy*, 55 Ill. 213; *contra*, *Peoria Ins. Co.* v. *Hall*, 12 Mich. 202. If the owner of personal property joins in insurance with the owner of the building, in which it is, and the agent knowingly issues such a policy, it will protect both. *Peck* v. *New London Ins. Co.*, 22 Conn. 584. He may allow the property insured to be removed to another place. *N. E. Ins. Co.* v. *Schettler*, 38 Ill. 166. If there were incumbrances on the property, and the facts were stated to the agent, and he disregards them, either by mistake of law, or inadvertence, the policy is good, although the policy provides that any act of the agent in violation of its provisions shall be the act of the insured, and avoid the policy. *Columbia Ins. Co.* v. *Cooper*, 50 Penn. St. 331. He has no power to promise that no assessments shall be made on the premium note. *Farmers' Ins. Co.* v. *Marshall*, 29 Vt. 23. Where the agent can take premiums he can use his discretion as to the mode. He may take a check (*Tayloe* v. *Merchants' Ins. Co.*, 9 How. [U. S.] 390); Confederate notes (*Robinson* v. *International Ass. Co.*, 42 N. Y. [3 Hand] 54); but not

property. *Hoffman* v. *Hancock Ins. Co.*, 92 U. S. 161. He may agree to be himself responsible to the company, and take the insured as his personal debtor. *Sheldon* v. *Conn. Ins. Co.*, 25 Conn. 207; *Bouton* v. *American Ins. Co.*, id. 542; *Post* v. *Ætna Ins. Co.*, 43 Barb. (N. Y.) 351; *contra*, *Catoir* v. *American Ins. Co.*, 33 N. J. 487. He may allow delay in payment. *N. Y. Central Ins. Co.* v. *Nat. Protection Ins. Co.*, 20 Barb. (N. Y.) 468; *Goit* v. *Same*, 25 id. 189; *Hallock* v. *Commercial Ins. Co.*, 26 N. J. 268; *Whitaker* v. *Farmers' Ins. Co.*, 29 Barb. (N. Y.) 312. Where the contract is subject to the approval of the company, they will not be allowed arbitrarily to refuse their assent after a loss. *Perkins* v. *Washington Ins. Co.*, 4 Cow. (N. Y.) 645, reversing 6 Johns. Ch. 485. Notice to the agent, of material facts, is notice to the principal, whether actually communicated or not. *Bebee* v. *Hartford Ins. Co.*, 25 Conn. 51; *People's Ins. Co.* v. *Spencer*, 53 Penn. St. 353; *Liddle* v. *Market Ins. Co.*, 4 Bosw. (N. Y.) 179; *Beal* v. *Park Ins. Co.*, 16 Wis. 241; *Hough* v. *City Ins. Co.*, 29 Conn. 10; *Keenan* v. *Mo. State Ins. Co.*, 12 Iowa, 126; *Combs* v. *Hannibal Ins. Co.*, 43 Mo. 148. But, in Massachusetts and Rhode Island, the rule is held strictly, and all evidence to control the writings excluded, and the knowledge of the agent or notice to him at the inception of the contract, not made a part of the papers, is ineffectual. *Lee* v. *Howard Ins. Co.*, 3 Gray (Mass.), 583; *Barrett* v. *Union Ins. Co.*, 7 Cush. (Mass.) 173; *Abbott* v. *Shawmut Ins. Co.*, 3 Allen (Mass.), 213; *Wilson* v. *Conway Ins. Co.*, 4 R. I. 141. Notice of an assignment, given to the agent, is notice to the principal, to prevent its passing to the assignee in bankruptcy (*Gale* v. *Lewis*, 9 Q. B. 730); but it is not equivalent to an assent by the company. *Ayres* v. *Hartford Ins. Co.*, 17 Iowa, 176. Still more are they chargeable when they make it the agent's duty to inquire into the particular matter. *Roth* v. *City Ins. Co.*, 6 McL. (C. C.) 324; *Cumberland Valley Ins. Co.* v. *Schell*, 29 Penn. St 31; *Com. Ins. Co.* v. *Ives*, 56 Ill. 402. So of a case where he himself examines, and omits facts which were open to him (*Cumberland Valley Ins. Co.* v. *Schell*, 29 Penn. St. 31; *Meadowcraft* v. *Standard Ins. Co.*, 61 id. 91; *Plumb* v. *Cattaraugus Ins. Co.*, 18 N. Y. 392); as, for instance, knowledge of the use of a steam boiler. *Campbell* v. *Merchants' Ins. Co.*, 37 N. H. 35; May on Ins., § 143.

But, where the agent is made agent of the insured, his knowledge does not affect the company. *Alexander* v. *Germania Ins. Co.*, 66 N. Y. (21 Sick.) 464. Verbal notice to the agent is enough as to matters occurring after the insurance, unless the contract requires written notice. *McEwen* v. *Montgomery Ins. Co.*, 5 Hill (N. Y.), 101; *Schenck* v. *Mercer County Ins. Co.*, 24 N. J. 447. Notice to the agent, of subse-

quent insurance, is notice to the company. *N. E. Ins. Co.* v. *Schettler*, 38 Ill. 166. But after the policy is issued, mere knowledge by the agent of a subsequent insurance is not notice to the company. *Schenck* v. *Mercer County Ins. Co.*, 24 N. J. 447; *Mellen* v. *Hamilton Ins. Co.*, 5 Duer (N. Y.), 101; S. C., 17 N. Y. 609; *Ayres* v. *Hartford Ins. Co.*, 17 Iowa, 176; *Forbes* v. *Agawam Ins. Co.*, 9 Cush. (Mass.) 470. If the matter is one with which the agent has no concern, but which requires action by some other officer, notice to the agent is not enough. *Sykes* v. *Perry County Ins. Co.*, 34 Penn. St. 79; *Robinson* v. *Mercer County Ins. Co.*, 27 N. J. 134; *Mitchell* v. *Lycoming Ins. Co.*, 51 Penn. St. 402; *Tate* v. *Citizens' Ins. Co.*, 13 Gray (Mass.), 79. Where a statement is made a warranty, knowledge of the agent that the statement is false will not aid it. *Barteau* v. *Phœnix Ins. Co.*, 67 N. Y. (22 Sick.) 595. The contract may provide that the insurers shall not be bound by any knowledge or agreement of the agent not set out in the papers, and they are then exonerated. *Shawmut Ins. Co.* v. *Stevens*, 9 Allen (Mass.), 332; *Chase* v. *Hamilton Ins. Co.*, 20 N. Y. (6 Smith) 52; *Loehner* v. *Home Ins. Co.*, 17 Mo. 247. He cannot bind the insurers where the contract, if made directly with them, would be invalid, as where the building is already burned. *Bentley* v. *Columbia Ins. Co.*, 17 N. Y. (3 Smith) 421. He cannot make a contract in which he has himself an interest as insured (id.); nor accept notice of an assignment of his own policy (*Ex parte Hennessy*, 1 Con. & Law, 559); nor assent to an assignment which the contract requires shall be assented to by the corporation. *Stringham* v. *St. Nicholas Ins. Co.*, 3 Keyes, 280; S. C., 4 Abb. Ct. App. 315; *Mentz* v. *Lancaster Ins. Co.*, 79 Penn. St. 475. Where the premium was to be paid on the delivery of the policy which was to be issued from the home office, a receipt for "insurance" given by the agent when he takes the application will not prove a contract. *Linford* v. *Provincial Ins. Co.*, 34 Beav 291. An agent to take applications and issue policies does not have power over the contract, when once made, to waive forfeitures. *Harrison* v. *City Ins. Co.*, 9 Allen (Mass.), 231; *Phœnix Ins. Co.* v. *Lawrence*, 4 Metc. (Ky.) 9; *Mersereau* v. *Phœnix Ins. Co.*, 66 N. Y. 274. The company may be estopped by his acts, as where he filled up an application, without waiting for information which the applicant had promised, and signed it for the applicant. *Wilson* v. *Conway Ins. Co.*, 4 R. I. 141. But, where the insured afterward received the policy, with a copy of the application, and the contract provided that by accepting the policy he became responsible for the truth of the statements in the application, a material false statement avoids the policy. *Richardson* v. *Maine Ins. Co.*, 46 Me. 394. He may consent to a change of title (*Illinois Ins.*

Co. v. *Stanton*, 57 Ill. 354), or execute a permit for other insurance (*Warner* v. *Peoria Ins. Co.*, 14 Wis. 318), or waive a forfeiture on account of change of title by taking a premium and issuing a renewal receipt. *Miner* v. *Phœnix Ins. Co.*, 27 Wis. 693; 9 Am. Rep. 479. The agent of a mutual company cannot waive the requirements of the by-laws adopted for the mutual protection of the members. *Mulrey* v. *Shawmut Ins. Co.*, 4 Allen (Mass.), 116. Even the president of an insurance company cannot waive the requirement of the by-laws that the premium shall be paid before the policy takes effect. *Baxter* v. *Chelsea Ins. Co.*, 1 Allen (Mass.), 294. An agent cannot appoint a referee upon a loss. *Turner* v. *Quincy Ins. Co.*, 109 Mass. 568. Where the company reserves the right of approval, he cannot deprive them of it. *N. Y. Union Ins. Co.* v. *Johnson*, 23 Penn. St. 72. A delivery of a new premium note to him by assignees of the policy is not a delivery to the company (*Fogg* v. *Middlesex Ins. Co.*, 10 Cush. [Mass.] 337), nor can he bind the company to surrender the note on a cancellation of the policy. *Marblehead Ins. Co.* v. *Underwood*, 3 Gray (Mass.), 210. In case of such mutual companies, the officials must strictly conform to the by-laws. *Evans* v. *Trimountain Ins. Co.*, 9 Allen (Mass.), 329; *Hale* v. *Mechanics' Ins. Co.*, 6 Gray (Mass.), 169. They cannot waive the payment of the premium, or a delivery of the deposit note, when these are made conditions precedent. *Brewer* v. *Chelsea Ins. Co.*, 14 Gray (Mass.), 203; *Baxter* v. *Chelsea Ins. Co.*, 1 Allen (Mass.), 294; *Belleville Ins. Co.* v. *Van Winkle*, 12 N. J. Eq. 333. But this only applies to stipulations which are made of the essence of the contract. *Sheldon* v. *Com. Ins. Co.*, 25 Conn. 207. Such are the regulations as to proof of loss. *Priest* v. *Citizens' Ins. Co.*, 3 Allen (Mass.), 602. But there must be some actual waiver; a statement by the agent that it would be all right, or mere knowledge by him of all the facts, is not enough. *Boyle* v. *Ins. Co.*, 7 Jones' L. (N. C.) 373; *Smith* v. *Haverhill Ins. Co.*, 1 Allen (Mass.), 297. An agent with general powers may, by parol, extend the scope of a policy already issued, to new goods (*Kennebec Co.* v. *Augusta Ins. Co.*, 6 Gray [Mass.], 204), or correct an error in the policy. *Warner* v. *Peoria Ins. Co.*, 14 Wis. 318. A general agent may waive conditions as to preliminary proofs of loss (*Eastern Railroad* v. *Relief Ins. Co.*, 105 Mass. 570); the prepayment of the premium (*Boehen* v. *Williamsburgh Ins. Co.*, 35 N. Y. [8 Tiff.] 131); the requirement that notice be given of notice of other insurance (*Carroll* v. *Charter Oak Ins. Co.*, 40 Barb. [N. Y.] 292), or that the policy be countersigned by him. *Myers* v. *Keystone Ins. Co.*, 27 Penn. St. 268. In general the agent may perform his duties by clerks or sub-agents. *Kennebec Co.*

v. *Augusta Ins. Co.*, 6 Gray (Mass.), 204; *Bodine* v. *Exchange Ins. Co.*, 51 N. Y. 117; 10 Am. Rep. 566; *Eclectic Ins. Co.* v. *Fahrenkrug*, 68 Ill. 463. When the insured was ignorant of the provision making the agent his agent, he may treat him as the agent of the insurers. *Gates* v. *Penn. Ins. Co.*, 17 N. Y. Sup. (10 Hun) 489.

§ 3. **Duties of agents.** Agents of insurance companies owe duties to the principal by whom they are employed, and to the persons who may seek insurance through them. Many of these duties are of such a nature that the law is not invoked to compel their performance. Such are the duties of zeal and industry which the insurers have a right to require, and that reasonable care and discretion in the performance of the business which the person accepting the employment, engages that he has and will bestow. Vol. I, page 240, § 6. But, it has been found generally easier to secure a remedy for failure to furnish qualities of this sort by the termination of the employment, than in any form of legal redress. The agent must use care in the selection of the risks; he must fix the premiums at a remunerative rate; he must advise his company of any changes in the risk and be prepared to advise them with regard to all matters material to their interests. Vol. I, page 241, § 7. It is his duty to conform to all instructions given him, and to remit all moneys received. He is not required to perform all the duties in person, but may intrust them to a clerk or sub-agent. *Bodine* v. *Exchange Ins. Co.*, 51 N. Y. (6 Sick.) 117; 10 Am. Rep. 566. It is his duty to serve his principal alone. He cannot have any interest adverse to that of his principal. If he applies for insurance on his own property, as to that property he is no agent of the company. *Bentley* v. *Columbian Ins. Co.*, 17 N. Y. (3 Smith) 421; S. C., 19 Barb. 595; *N. Y. Central Ins. Co.* v. *Nat. Protection Ins. Co.* 14 N. Y. 85; S. C., 20 Barb. (N. Y.) 468; *Utica Ins. Co.* v. *Toledo Ins. Co.*, 17 Barb. 132. He cannot act as agent for both parties (id.); nor where he assigns his own policy can he accept notice of the assignment. *Ex parte Hennessy*, 1 Con. & Law, 559. By agreement of the parties, who are members of a mutual insurance company, the assured may become responsible for the truth of the statements in his application for insurance, and in this sense he will be his own agent. *Susquehanna Ins. Co.* v. *Perrine*, 7 W. & S. (Penn.) 348.

§ 4. **Liabilities of agents.** The agent is liable for a breach of any of the duties which we have considered above which amount to a breach of the implied contract to perform those duties. Vol. I, page 249, § 1.

A known agent is not responsible to third parties (*Ferris* v. *Kilmer*, 48 N. Y. [3 Sick.] 300), unless he expressly assumes such respon-

sibility, which he may do. *Wilder* v. *Cowles*, 100 Mass. 487. He cannot be held liable twice, and he must answer to his principal, and his principal to the third person. But this rule only extends to matters within his authority and for which the principal can be held. If the person dealing with him has no remedy against the principal, he may look to the agent himself. Vol. I, page 257, § 3; *Booth* v. *Wonderly*, 36 N. J. 250. But a person who has himself knowingly induced the agent to exceed his authority has no remedy against him. *Aspinwall* v. *Torrance*, 1 Lans. (N. Y.) 381. So, if he took the risk of the agent's authority on a doubtful point. If an agent to whom was committed an application for insurance should neglect to perfect the contract, he would be so far the agent of the applicant and liable to him for the wrong. Where the agent settled a loss for twenty per cent, without authority, he was held liable to his principal. *Rundle* v. *Moore*, 3 Johns. Cas. 36. If he pays a premium after notice not to pay it, he cannot recover it of the insured. *Shoemaker* v. *Smith*, 2 Binn. (Penn.) 239. But he is not liable for not procuring the most favorable form of policy. *Comber* v. *Anderson*, 1 Camp. 523; *Silverthorne* v. *Gillespie*, 9 U. C. 414. It will make no difference on the question of the liability of the agent whether he acted under an express authority given him by his principal, or under an authority implied by law, or whether the act was one which the insurer was estopped to deny. In either case the remedy is against the principal.

ARTICLE V.

WARRANTY; REPRESENTATION; CONCEALMENT.

Section 1. In general. Insurance is a contract in which the utmost good faith is required on the part of the insured, as it offers to the insured great opportunities for fraud, and as many things which are most material to the contract, either as inducement to the insurer to enter into it, or as objections to it, lie, for all practical purposes, wholly within the knowledge of the insured, the law has required of him a full disclosure. The insurers, as a rule, add to this law stringent provisions in the policies which they issue. Here as elsewhere in insurance, such stipulations will be construed reasonably by the court, the end always held in view being, to give the contract the effect in all material matters which the parties designed. The courts do not favor any construction which will make the validity of the contract turn upon collateral and unimportant matters, unless the parties have so agreed in express terms. *Kentucky Ins. Co.* v. *Southard*, 8 B. Monr.

(Ky.) 637. But, whatever may be the particular form of the contract, the party insured will be held to give information in substance correct, as to every material circumstance. It will be enough in the absence of agreement as to the mode, if the information reaches the company in any way, as we have already seen. *Ante*, 28, art. 4, § 2. If the insured intentionally conceals any material fact, it will deprive him of the advantage of his contract.

§ 2. **Warranty.** An express warranty is a stipulation inserted in writing on the face of the policy, on the literal truth or fulfillment of which the validity of the entire contract depends. 1 Am. Ins. 577; *Wall* v. *East River Ins. Co.*, 7 N. Y. (3 Seld.) 370. As a general rule, any stipulation or condition so inserted becomes a warranty. It is in its nature a condition precedent, and must be strictly complied with *Daniels* v. *Hudson River Ins. Co.*, 62 Cush. (Mass.) 416; *Ripley* v. *Ætna Ins. Co.*, 30 N. Y. 136. It in no way alters the effect, that the fact stated or act stipulated for is of no consequence. *Barteau* v. *Phœnix Ins. Co.*, 67 N. Y. (22 Sick.) 595. Nor is the cause of the breach of warranty of any importance (*Fitch* v. *American Ins. Co.*, 59 N. Y. [14 Sick.] 557; 17 Am. Rep. 372), nor that the thing substituted is more advantageous to the insurer. *Wood* v. *Hartford Ins. Co.*, 13 Conn. 533. It is enough to make the contract void that it contains a warranty which is broken. *Newcastle Ins. Co.* v. *McMorran*, 3 Dowl. P. C. 255; *Sayles* v. *Northwestern Ins. Co.*, 2 Curt. (U. S.) 610; *Witherell* v. *Maine Ins. Co.*, 49 Me. 200; *Anderson* v. *Fitzgerald*, 4 H. L. Cas. 484. Nor does it help the insured, that the breach of warranty did not cause the loss. *Garrett* v. *Provincial Ins. Co.*, 20 U. C. 200; *Murdock* v. *Chenango Co. Ins. Co.*, 2 Comst. 210. The question whether a clause is a warranty does not depend on the words used, but any statement upon the truth of which it appears to be the intention of the parties to make the validity of the contract depend, is a warranty. It is a question of intention. *Scales* v. *Scanlan*, 6 Ir. Law, 367; *Wheelton* v. *Hardisty*, 8 El. & B. 232; *Kingsley* v. *N. E. Ins. Co.*, 8 Cush. (Mass.) 393. Thus a fact stated merely by way of description or recital, and not material to the risk, was held not to be a warranty. *Schultz* v. *Merchants' Ins. Co.*, 57 Mo. 331. Where all the statements of the application were made warranties, but the application covenanted that all matters stated in it were true, so far as material, immaterial statements were held not to be warranties. *Garcelon* v. *Hampden Ins. Co.*, 50 Me. 580; *Washington Ins. Co.* v. *Haney*, 10 Kans. 525. Warranties are, affirmative which allege some fact, or are promissory, which require the performance or omission of some act, during the continuance of the contract. *Borradaile* v. *Hunter*, 5 M. & G. 639; *Jennings* v.

Chenango Co. Ins. Co., 2 Den. (N. Y.) 75; *Stout* v. *City Ins. Co.*, 12 Iowa, 371. Where the statement is in some other paper, it is a question of construction whether the paper is made a part of the policy, and the statement thereby becomes a warranty. An indication in the policy where the application is to be found is not enough. *Com. Ins. Co.* v. *Monninger*, 18 Ind. 352. If the statement is anywhere on the face, as on the margin, or written across the face, it is enough. *Bean* v. *Stupart*, 1 Doug. 11; *Patch* v. *Phœnix Ins. Co.*, 44 Vt. 481. Where the conditions were printed on the second page of the policy, but not referred to in the policy, they are a part of it. *Murdock* v. *Chenango Co. Ins. Co.*, 2 N. Y. 210; *Roberts* v. *Same*, 3 Hill (N. Y.), 501. A paper relating to the subject-matter attached to the policy is no part of it (*Bize* v. *Fletcher*, Doug. 13, *n.*), nor a paper inclosed and folded up in the policy. *Kentucky Ins. Co.* v. *Southard*, 8 B. Monr. (Ky.) 634; *Pawson* v. *Watson*, Cowp. 785. A statement printed on the back is only a part of the policy so far as it is referred to. *Stone* v. *U. S. Casualty Co.*, 34 N. J. 371; *Kingsley* v. *N. E. Ins. Co.*, 8 Cush. (Mass.) 393. And the reference must indicate the intention to make it part of the policy. *Farmers' Ins. Co.* v. *Snyder*, 16 Wend. (N. Y.) 481; *Houghton* v. *Manufacturers' Ins. Co.*, 8 Metc. (Mass.) 114; *Kentucky Ins. Co.* v. *Southard*, 8 B. Monr. 634; *Sayles* v. *Northwestern Ins. Co.*, 2 Curt. (C. C.) 610; *Mut. Benefit Ins. Co.* v. *Robertson*, 59 Ill. 123; 14 Am. Rep. 8; *Shoemaker* v. *Glen's Falls Ins. Co.*, 60 Barb. (N. Y.) 84. When the application and survey are expressly referred to as parts of the contract, they become warranties. *Columbia Ins. Co.* v. *Cooper*, 50 Penn. St. 331; *Denny* v. *Conway Ins. Co.*, 13 Gray (Mass.), 492; *Jefferson Ins. Co.* v. *Cotheal*, 7 Wend. (N. Y.) 72; *Wall* v. *Howard Ins. Co.*, 14 Barb. (N. Y.) 383; *Sheldon* v. *Hartford Ins. Co.*, 22 Conn. 235; *Commonwealth Ins. Co.* v. *Monninger*, 18 Ind. 352.

Though the application is referred to as part of the contract, it is not enough if its statements are called "representations" (*Houghton* v. *Manufacturers' Ins. Co.*, 8 Metc. [Mass.] 114); or if the reference is for some other purpose than to make its statements warranties. *Campbell* v. *N. E. Ins. Co.*, 98 Mass. 381. A reference to a survey only makes such parts of the paper as properly come under that name warranties. *Denny* v. *Conway Ins. Co.*, 13 Gray (Mass.), 492. If there is any ambiguity in the reference, it will be construed against the company. Thus a reference to the application "for a more particular description" is not enough. *Trench* v. *Chenango Co. Ins. Co.*, 7 Hill (N. Y.), 122; *Daniels* v. *Hudson River Ins. Co.*, 12 Cush. (Mass.) 416. The reference may be controlled by other stipulations.

Where it is agreed in the application that misrepresentation or suppression of material facts shall avoid the policy, it limits the words of the policy. *Elliott* v. *Hamilton Ins. Co.*, 13 Gray (Mass.), 139.

If the insured covenants that the statements are true as to value and risk, they are warranties only on these points. *Lindsey* v. *Union Ins. Co.*, 3 R. I. 157. A reference to statements as believed to be true is only a warranty of the belief. *Wheelton* v. *Hardisty*, 8 El. & B. 232. If there is any doubt as to the intention to make the literal truth or performance a condition precedent, the statement or agreement will not be a warranty. Id.; *Stokes* v. *Cox*, 1 H. & N. 320, 533; *Mutual Benefit Ins. Co.* v. *Robertson*, 59 Ill. 123; 14 Am. Rep. 8; *Jefferson Ins. Co.* v. *Cotheal*, 7 Wend. (N. Y.) 72. "On condition that the insured will take all risk from cotton waste," is no warranty. *Kingsley* v. *N. E. Ins. Co.*, 8 Cush. (Mass.) 393. What the parties themselves have designated as representations, declarations or statements, will not ordinarily be given the force of warranties. *Price* v. *Phœnix Ins. Co.*, 17 Minn. 497; 10 Am. Rep. 166; *Campbell* v. *N. E. Ins. Co.*, 98 Mass. 381. Where the application is defective in matters known to the insurers, or their agents, and they nevertheless issue a policy, it is good. *Wilson* v. *Hampden Ins. Co.*, 4 R. I. 159; *Campbell* v. *Merchants' Ins. Co.*, 37 N. H. 35; *Cumberland Valley Ins. Co.* v. *Schell*, 29 Penn. St. 31. A negative answer to a general question as to farther knowledge of material matters will not be applied to questions not answered at all, but the answers to these will be waived if a policy is issued. *Liberty Hall Ass.* v. *Housatonic Ins. Co.*, 7 Gray (Mass.), 261. A policy referring to an application, when there is none, is valid. *Blake* v. *Exchange Ins. Co.*, 12 Gray (Mass.), 265. The insured is not bound by statements in an application not signed by or known to him, though the policy refers to it. *Denny* v. *Conway Ins. Co.*, 13 Gray (Mass.), 294. But if signed by his agent it binds him. *Draper* v. *Charter Oak Ins. Co.*, 2 Allen (Mass.), 569. The application being construed with the policy, as one contract, may limit it. Thus, where the policy required the statements in the declaration to be true throughout, but the declaration provided that statements designedly untrue shall avoid the policy, the latter will prevail. *Fowkes* v. *Manchester Ass. Assoc.*, 3 Best & S. 917. So where under a policy requiring the statements of the application to be true, the application required answers to the best of the insured's knowledge and belief. *Washington Ins. Co.* v. *Haney*, 10 Kans. 525; *Garcelon* v. *Hampden Ins. Co.*, 50 Me. 580. The fact that the matter referred to is of no consequence, is to be considered in construing the provision as a warranty or otherwise. *O'Neil* v. *Buffalo Ins. Co.*, 3 N. Y. 122. Thus, where "any

false statement in obtaining the insurance made it void," an immaterial statement would not be likely to aid in obtaining it. *Anderson* v. *Fitzgerald*, 4 H. L. Cas. 484. A warranty will not be extended by construction, and will be construed strictly against those who are benefited by it, and in such way if possible as to avoid a forfeiture. *Blood* v. *Howard Ins. Co.*, 12 Cush. (Mass.) 472; *Shepherd* v. *Union Ins. Co.*, 38 N. H. 232; *Catlin* v. *Springfield Ins. Co.*, 1 Sumn. (U. S.) 434; *Ripley* v. *Ætna Ins. Co.*, 29 Barb. (N. Y.) 552. Statements and stipulations not required by the contract are not made warranties by a reference. *Hartford Protection Ins. Co.* v. *Harmer*, 2 Ohio St. 254. Warranties are construed strictly as to their scope. A warranty that a room is warmed by a stove with a pipe well secured, only applies to such time as it is actually warmed (*Loud* v. *Citizens' Ins. Co.*, 2 Gray [Mass.], 221); that water tanks on a building in course of erection shall be at all times well supplied with water, means that they shall be built and filled as soon as it can conveniently be done. *Gloucester Man. Co.* v. *Howard Ins. Co.*, 5 Gray (Mass.), 497. A warranty of force pumps ready for use implies power to run them, but does not define the kind of pump, or warrant that they shall not be disabled at a particular time, nor that there shall be hose. *Sayles* v. *N. W. Ins. Co.*, 2 Curt. (C. C.) 610; *Peoria Ins. Co.* v. *Lewis*, 18 Ill. 553; *Gilliatbert* v. *Pawtucket Ins. Co.*, 8 R. I. 282. Where the application stated that a watchman was kept, there was a breach, if a sheriff took possession and excluded all the employees, although he himself remained on the premises. *First National Bank* v. *Ins. Co. of N. A.*, 50 N. Y. (5 Sick.) 45. Where the warranty of a watchman was general, the manner of performance is to be reasonable. *Crocker* v. *People's Ins. Co.*, 8 Cush. (Mass.) 79. Where the warranty was of a watchman nights, and he had left, and the mill was burned before night, there was no recovery. *Glendale Woolen Co.* v. *Protection Ins. Co.*, 21 Conn. 19. He need not, however, be kept in the part insured, and where it was known that there was no means of keeping a record of his duty, a failure to do so was excused, though required by the policy. *Andes Ins. Co.* v. *Shipman*, 77 Ill. 189. In some cases, statements as to the use and occupation of property have been held warranties. Thus the description must be true, where the property is insured as "a stock in a brick building occupied as a storehouse (*Wall* v. *East River Ins. Co.*, 7 N. Y. [3 Seld.] 370); a paper mill (*Wood* v. *Hartford Ins. Co.*, 13 Conn. 533); a dwelling-house (*Sarsfield* v. *Metropolitan Ins. Co.*, 61 Barb. [N. Y.] 479; *Alexander* v. *Germania Ins. Co.*, 66 N. Y. [21 Sick.] 464); a machine shop. *Goddard* v. *Monitor Ins. Co.*, 108 Mass. 56; 11 Am. Rep. 307. So where a description of the place of deposit is given in the application

(*Bryce* v. *Lorillard Ins. Co.*, 55 N. Y. [10 Sick.] 240; 14 Am. Rep. 249); or a statement of the location, materials, and purposes. *U. S. Ins. Co.* v. *Kimberly*, 34 Md. 224; 6 Am. Rep. 325; *Severance* v. *Continental Ins. Co.*, 5 Biss. (C. C.) 156. In other cases such statements have been held matters of description or representation only. *Maher* v. *Hibernian Ins. Co.*, 6 Hun (N. Y.), 353; *Schmidt* v. *Peoria Ins. Co.*, 41 Ill. 295; *Dobson* v. *Sotheby*, 1 Moo. & M. 90; *Bryan* v. *Peabody Ins. Co.*, 8 W. Va. 605; *Everett* v. *Continental Ins. Co.*, 21 Minn. 76; *Southern Ins. Co.* v. *Lewis*, 42 Ga. 587; *Schultz* v. *Merchants' Ins. Co.*, 57 Mo. 331. In other cases it is held only a warranty of the present state of affairs, but not that they shall continue. Instances are, describing the building as a tavern (*Catlin* v. *Springfield Ins. Co.*, 1 Sumn. [C. C.] 434); naming the occupant (*O'Niel* v. *Buffalo Ins. Co.*, 3 N. Y. 132); stating the use of the buildings (*Smith* v. *Mechanics' Ins. Co.*, 32 N. Y. [5 Tiff.] 399; *Cumberland Valley Ins. Co.* v. *Schell*, 29 Penn. St. 31; *U. S. Ins. Co.* v. *Kimberly*, 34 Md. 224; 6 Am. Rep. 325; *Stout* v. *City Ins. Co.*, 12 Iowa, 371; *Prieger* v. *Exchange Ins. Co.*, 6 Wis. 89); a statement that a clerk sleeps in the store. *Frisbie* v. *Fayette Ins. Co.*, 27 Penn. St. 325. Where there is a warranty that ashes are kept in brick, any equally safe way of keeping them will do. *Underhill* v. *Agawam Ins. Co.*, 6 Cush. (Mass.) 440. Where the policy prohibits smoking, the insured must abstain, and use reasonable efforts to prevent others. *Ins. Co. of N. A.* v. *McDowell*, 50 Ill. 120.

§ 3. **Representations.** A representation is a statement incidental to the contract relative to some fact having reference thereto, and upon the faith of which the contract is entered into. May on Ins., § 181; *Barteau* v. *Phœnix Ins. Co.*, 67 N. Y. 595.

Representations may be either affirmative or promissory. The former are allegations of facts as then existing; the latter concern what is to happen during the existence of the insurance, either as expectation or as contract. Material falsity in an affirmative representation will avoid the contract (*Lycoming Ins. Co.* v. *Rubin*, 79 Ill. 402), while the failure of an oral promissory representation does not affect it, although it may be evidence of fraud. *Kimball* v. *Ætna Ins. Co.*, 9 Allen (Mass.), 540. A representation is collateral to the contract, and may be proved by parol. The insured must prove whatever the policy requires in order to establish any liability. The insurer then may prove representations false and material outside the policy, which in effect prove that the risk is not the one which he insured. Thus, if the building was represented as a dwelling-house and it was really a manufactory, then it is not the building insured. *Campbell* v. *N. E. Ins.*

Co., 98 Mass. 381; *Miller* v. *Nat. Benefit Ins. Co.*, 31 Iowa, 216; 7 Am. Rep. 122. The question of the materiality is for the jury where the facts are in dispute. *Garcelon* v. *Hampden Ins. Co.*, 50 Me. 580; *Mutual Ins. Co.* v. *Deale*, 18 Md. 26; *Keeler* v. *Niagara Ins. Co.*, 16 Wis. 523; *Farmers' Ins. Co.* v. *Snyder*, 16 Wend. (N. Y.) 481; *Daniels* v. *Hudson River Ins. Co.*, 12 Cush. (Mass.) 416. But where the representations are in writing, it may appear from the papers themselves that the parties have treated certain matters as conclusive, and if they have done so, it is final. *Wilson* v. *Conway Ins. Co.*, 4 R. I. 141; *LeRoy* v. *Market Ins. Co.*, 39 N. Y. (12 Tiff.) 90; *Towne* v. *Fitchburg Ins. Co.*, 7 Allen (Mass.), 51; *Anderson* v. *Fitzgerald*, 4 H. L. Cas. 484. The question of the truth of the representations is ordinarily for the jury, their materiality for the court. It is enough if the jury find them to be substantially, though not literally true. *N. A. Ins. Co.* v. *Throop*, 22 Mich. 146; 7 Am. Rep. 638; *Foot* v. *Ætna Life Ins. Co.*, 61 N. Y. (16 Sick.) 571. If the representations be true as to part of the subject insured and false as to the rest, the whole contract is void when it is entire. Id. As where it is a representation of unincumbered title in the insured, and in fact he has no title to part, or it is mortgaged. *Day* v. *Charter Oak Ins. Co.*, 51 Me. 91; *Trench* v. *Chenango County Ins. Co.*, 7 Hill (N. Y.), 122; *Friesmuth* v. *Agawam Ins. Co.*, 10 Cush. (Mass.) 587; *Smith* v. *Empire Ins. Co.*, 25 Barb. (N. Y.) 497; *Gould* v. *York County Ins. Co.*, 47 Me. 403; *contra*, *Koontz* v. *Hannibal, etc., Ins. Co.*, 42 Mo. 126; *Phœnix Ins. Co.* v. *Lawrence*, 4 Metc. (Ky.) 9. The representation speaks as of the time when the contract is closed. If it be true then, it is immaterial that it was false when made. If false then, it avoids the policy. *Traill* v. *Baring*, 4 DeG. & S. 318. The state of facts at the consummation of the contract is deemed its basis. *British Eq. Ins. Co.* v. *Great Western Railway Co.*, 39 L. J. Ch. 132; S. C., 20 L. T. (N. S.) 422; *Calvert* v. *Hamilton Ins. Co.*, 1 Allen (Mass.), 308. In case of renewals where there are no other circumstances to determine the intention, the courts differ, some referring the matter to the circumstances existing at the time of the renewal (*Brady* v. *N. W. Ins. Co.*, 11 Mich. 425); and others regarding it as simply a continuance of the old contract. *Baltimore Ins. Co.* v. *McGowan*, 16 Md. 47; *N. E. Ins. Co.* v. *Wetmore*, 32 Ill. 221. But the circumstances may disclose the intention, as where goods which were insured as in one place, were removed, and this was known to the company, who still renewed the policy. *Ludwig* v. *Jersey City Ins. Co.*, 48 N. Y. (3 Sick.) 379; 8 Am. Rep. 556. As the insurers form the policy and have power to make all statements which they deem material warranties, the

courts will not aid them by construction. *Rann* v. *Home Ins. Co.*, 59 N. Y. (14 Sick.) 387; *Rafferty* v. *Brunswick Ins. Co.*, 18 N. J. 480; *Boardman* v. *Merrimack Ins. Co.*, 8 Cush. (Mass.) 583; *Boardman* v. *N. H. Ins. Co.*, 20 N. H. 551. If the application is in writing, parol evidence of other representations is not admissible. *Boggs* v. *America Ins. Co.*, 30 Mo. 63. See *Kimball* v. *Ætna Ins. Co.*, 9 Allen (Mass.), 540; *Alston* v. *Mechanics' Ins. Co.*, 4 Hill (N. Y.), 329; *Girard Ins. Co.* v. *Stephenson*, 37 Penn. St. 293. A representation is material when its truth or falsity would probably and naturally have induced the insurer either to enter into the contract or to refuse to do so. *Barteau* v. *Phœnix Ins. Co.*, 67 N. Y. (22 Sick.) 595. One test of materiality is whether a larger premium would have been demanded. *Nicoll* v. *American Ins. Co.*, 3 W. & M. (U. S.) 529. It is not necessary that the representation should be in reference to matters relating directly to the risk, if they are such as a jury may find would have had weight in determining the acceptance or rejection of the application. Such for instance, as a statement that a prior insurance of the same risk had been made at a lower premium (*Sibbald* v. *Hill*, 2 Dowl. P. C. 263), or a case where the insured got a reinsurance on personal property by a representation that he had insurance on the building in which it was. *La. Ins. Co.* v. *N. O. Ins. Co.*, 13 La. Ann. 246. A statement that the building is occupied by tenants is a representation (*Schultz* v. *Merchants' Ins. Co.*, 57 Mo. 331; *Boardman* v. *N. H. Ins. Co.*, 20 N. H. 551), but a statement that adjoining land is vacant (*Stebbins* v. *Globe Ins. Co.*, 2 Hall [N. Y.], 632), or that the building is furnished (*Williams* v. *N. E. Ins. Co.*, 31 Me. 219), is not. Representations as to use include all things reasonably necessary for the business. Thus making reals is included in making lead pipe. *Collins* v. *Charleston Ins. Co.*, 10 Gray (Mass.), 155; *Sims* v. *State Ins. Co.*, 47 Mo. 54; 4 Am. Rep. 311. Where it is stated that open lights are not used in the mill, they may be used in the office. *Ins. of N. A.* v. *McDowell*, 50 Ill. 120. A statement that stock is taken every month is not a promissory representation. *Wynne* v. *Liverpool Ins. Co.*, 71 N. C. 121. Where benzine is allowed to a certain amount in cans it may be kept in one can. *Maryland Ins. Co.* v. *Whiteford*, 31 Md. 219; 1 Am. Rep. 45. A clause prohibiting the storing or using of petroleum is controlled by another which prohibits lighting with certain other oils. *Buchanan* v. *Exchange Ins. Co.*, 61 N. Y. (16 Sick.) 26. A substantial compliance with a promissory representation is enough. By a substantial compliance is meant the adoption of precautions intended for the same purpose adapted to it, and which may reasonably be regarded as equally efficacious. A reservoir

with pipes was regarded as a substantial equivalent for casks of water with buckets in each story. Representations must be construed with reference to the ends for which they are made, and a mere literal compliance is not enough. Thus a representation that water casks are kept in each room implies that they are fit for use and are kept filled. *Houghton* v. *Manufacturers' Ins. Co.*, 8 Metc. (Mass.) 114; *Aurora Ins. Co.* v. *Eddy*, 49 Ill. 106. Where the insurers were fully informed as to the facts, they cannot charge misrepresentation. *Andes Ins. Co.* v. *Fish*, 71 Ill. 620.

§ 4. **Concealment.** A concealment is an intentional withholding of some material fact relating to the risk, which good faith and fair dealing require to be communicated. It is the omission to disclose some fact which the insured knows, or ought to know, that it is his duty to state, in order that the insurer may understand the circumstances and risk as to which he is to contract. The fact must be known to the insured. *Sweet* v. *Fairlie*, 6 C. & P. 1; *Hall* v. *People's Ins. Co.*, 6 Gray (Mass.), 185; *Merchants' Ins. Co.* v. *Washington Ins. Co.*, 1 Hand (Ohio), 408; *Mutual Benefit Ins. Co.* v. *Robertson*, 59 Ill. 123; 14 Am. Rep. 8; *Gerhauser* v. *British Ins. Co.*, 7 Nev. 174. If a statement is called for by the policy or other papers, such statement will be either a warranty or a representation, and judged by the rules already set out. But if a statement of the fact is either not called for, or is collateral to some statement made, in either case its suppression may be a concealment.

The concealment of an agent is that of the owner, where the agent requests the owner to get insurance on his property, but conceals from such owner a material part of the risk. *Gladstone* v. *King*, 1 Maule & S. 35. Concealment is a want of the good faith required in insurance, and verges on fraud. It, therefore, does not exist where it appears that there was no design to conceal, or that the fact charged to be concealed, was not known or believed to be material. The knowledge of the insured may be either actual or constructive. He will properly be chargeable with what he, as a reasonable man, ought to know, for the insurers have a right to rely on a certain degree of intelligence in the insured. The fact of knowledge is usually for the jury, and that the matter was something which the insured would naturally know will have great weight. *Houghton* v. *Man. Ins. Co.*, 8 Metc. (Mass.) 114; *Denniston* v. *Thomaston Ins. Co.*, 20 Me. 125. If the fact is one which the insurer or his agent ought to know, or does know, there can be no concealment. *Carter* v. *Boehm*, 1 W. Bl. 593; *Boggs* v. *America Ins. Co.*, 30 Mo. 63; *Merchants' Ins. Co.* v. *Washington Ins. Co.*, 1 Hand (Ohio), 408; *Haley* v. *Dorchester Ins.*

Co., 12 Gray (Mass.), 545; *Fish* v. *Cottenet* 44 N. Y. 538; *Pimen* v. *Lewis*, 1 F. & F. 778. The following facts, it has been held, need not be stated unless in answer to inquiries; the character and business of tenants (*Lyon* v. *Com. Ins. Co.*, 2 Rob. [La.] 266); the character of adjoining buildings (*Satterthwaite* v. *Mutual Benefit Ins. Co.*, 14 Penn. St. 393); the erection of buildings which he had begun near (*Gates* v. *Madison County Ins. Co.*, 5 N. Y. 469); a suit about the property (*Hill* v. *Lafayette Ins. Co.*, 2 Mich. 476); how a building is heated or lighted unless the mode is unusual. *Girard Ins. Co.* v. *Stephenson*, 37 Penn. St. 293; *Clark* v. *Man. Ins. Co.*, 8 How. (U. S.) 235. In the following cases it is held that the facts ought to have been stated; the interest of the insured where its nature might have influenced the insurer (*Columbia Ins. Co.* v. *Lawrence*, 10 Pet. [U. S.] 507; *Catron* v. *Tenn. Ins. Co.*, 6 Humph. [Tenn.] 176); that the buildings were on leased land (*Fletcher* v. *Com. Ins. Co.*, 18 Pick. [Mass.] 419); that a part of the property had been levied on by the insured for rent and bought in (*Columbia Ins. Co.* v. *Cooper*, 50 Penn. St. 331); that there was a right of redemption in another (*Clapp* v. *Union Ins. Co.*, 27 N. H. 143); that the insured was mortgagee of the chattels insured (*Norwich Ins. Co.* v. *Boomer*, 52 Ill. 442; 4 Am. Rep. 618); that there was a mortgage on the property. *Delahay* v. *Memphis Ins. Co.*, 8 Humph. [Tenn.] 684. Where the insurers have undertaken to inform themselves by questions as to all material facts, the presumption arises that other matters not inquired about are not regarded by them as material, or that they rely on their agents or on other sources for knowledge. *Burritt* v. *Saratoga County Ins. Co.*, 5 Hill (N. Y.), 188; *Holmes* v. *Charlestown Ins. Co.*, 10 Metc. (Mass.) 211; *Jolly* v. *Baltimore Eq. Soc.*, 1 H. & G. (Md.) 295. But unusual facts, or those peculiar to the case, are not within this presumption and must be disclosed. If further, they are the cause of the insurance, this would raise the presumption that they are material, and would manifest that they were known to the insured. Such are threats or attempts to fire the property (*Curry* v. *Commonwealth Ins. Co.*, 10 Pick. [Mass.] 535; *Bebee* v. *Hartford Ins. Co.*, 25 Conn. 51; *Bowery Ins. Co.* v. *N. Y. Ins. Co.*, 17 Wend. [N. Y.] 359; *North America Ins. Co.* v. *Throop*, 22 Mich. 146); or to fire neighboring property which would endanger this. *Walden* v. *Louisiana Ins. Co.*, 12 La. [O. S.] 34; *Buffi* v. *Turner*, 6 Taunt. 338. A general statement which gives the company notice, and the opportunity to follow the matter up, is enough. *Bebee* v. *Hartford Ins. Co.*, 25 Conn. 51. The insurer may rely on his own examinations, but if he chooses rather to ask the insured, the latter cannot excuse his own false an-

swers or concealment by proof that the insurer might have obtained the information elsewhere. *North American Ins. Co.* v. *Throop*, 22 Mich. 146; 7 Am. Rep. 638. If threats were regarded as mere idle talk and had no influence on the mind of the insured, they need not be disclosed. *McBride* v. *Republic Ins. Co.*, 30 Wis. 562. Where the interrogatories call merely for the opinion of the insured, they cannot blame him if he gives an honest opinion though it is erroneous. *Dennison* v. *Thomaston Ins. Co.*, 20 Me. 125; *Haley* v. *Dorchester Ins. Co.*, 12 Gray (Mass.), 545; *Hogle* v. *Guardian Ins. Co.*, 6 Robt. (N. Y.) 567. An equivocal or evasive answer as to matters within the knowledge of the insured may amount to a concealment. *Cazenove* v. *British Eq. Ass.*, 6 C. B. (N. S.) 437; *Perrins* v. *Marine Ins. Co.*, 2 E. & E. 317. The concealment of the agent is chargeable to the principal. The materiality of the facts alleged to have been concealed and the knowledge of the insured is generally for the jury. *Sussex County Ins. Co.* v. *Woodruff*, 26 N. J. 541; *Perkins* v. *Equitable Ins. Co.*, 4 Allen (N. B.), 562. The test of materiality is whether the knowledge of any particular fact would have enhanced the rate. *Boggs* v. *American Ins. Co.*, 30 Mo. 63; *Protection Ins. Co.* v. *Hall*, 15 B. Monr. (Ky.) 411; *Columbia Ins. Co.* v. *Lawrence*, 10 Pet. (U. S.) 507. The materiality of an omission to state a lien on the property in mutual insurance was left to the jury. *Bowditch Ins. Co.* v. *Winslow*, 3 Gray (Mass.), 415. An arrangement between the mortgagor and the mortgagee in regard to the payment of the premium is not material. *Kernochan* v. *N. Y. Bowery Ins. Co.*, 17 N. Y. (3 Smith) 428.

ARTICLE VI.

SPECIAL PROVISIONS.

Section 1. In general. Insurance, as now generally carried on, has two parts. One class of the provisions of the policy define the particular class of insurance which the insurer intends to carry on, and the other relates to the particular risk on which the policy in question has been issued. Thus, a company may confine itself to one class of property, as dwelling-houses, or mills. A dwelling-house company may confine its business to dwelling-houses, with only certain exposures, or limit in other ways that class. The policy may also contain, besides these provisions defining the risk, other stipulations as to the future condition and situation of the property, for as the contract is a continuing one, it would be of little service to the insurer that the

property was a good risk at the inception of the contract unless he could have some guaranty that it should remain so. The courts have, as a rule, construed the stipulations which relate to the formation of the contract more strictly than those which refer to the subsequent state of the subject-matter. They are unwilling to tie up the use of the property, or limit the freedom of the person insured by conditions in the contract. *Joyce* v. *Maine Ins. Co.*, 45 Me. 168; *Gamwell* v. *Merchants' Ins. Co.*, 12 Cush. (Mass.) 167. If there are stipulations relating to the particular contract, they are to be construed by the general scope of the contract as set out in the remainder of the policy.

§ 2. **Alteration or increase of risk.** It is a common provision that if any change is made with the consent of the insured, which increases the risk, the policy shall be void. He must, in such case, avoid any alteration or change in the building, or its use, or the introduction of any mode of conducting his business, and the discontinuance of any precautions, if either of these things will naturally increase the risk. The standard is the condition and occupation of the property as exhibited in the policy and made the base of the insurance. Any substantial variation from this, injurious to the risk, will be a violation of this provision. *Houghton* v. *Manufacturers' Ins. Co.*, 8 Mete. (Mass.) 114. The question, as to the materiality of such change, will be for the jury. *Hobby* v. *Dana*, 17 Barb. (N. Y.) 111; *Jennings* v. *Chenango County Ins. Co.*, 2 Den. (N. Y.) 75; *Curry* v. *Com. Ins. Co.*, 10 Pick. (Mass.) 535. Such is the case of the erection of a steam engine, where the policy represented that there was none. *Stokes* v. *Cox*, 1 H. & N. 533. The intention to make the change is of no effect, unless carried out. *Summers* v. *U. S. Ins. Co.*, 13 La. Ann. 504. That certain uses are enumerated in the policy as hazardous does not exclude others from being counted so. *Boatwright* v. *Ætna Ins. Co.*, 1 Strobh. (S. C.) 281. The insured does not relinquish the power of exercising the ordinary and necessary rights of ownership over the property, and he may make not only ordinary, but general repairs and changes, when necessary to its use. *Townsend* v. *Northwestern Ins. Co.*, 18 N. Y. (4 Smith) 168. He may use, protect and enjoy his property, as such property is usually used and enjoyed, as it is presumed that this was intended. *Washington Ins. Co.* v. *Davison*, 30 Md. 91; *Jolly* v. *Baltimore Eq. Soc.*, 1 Harr. & G. (Md.) 295. The increase of risk must be a material one to come under this clause. *Allen* v. *Mutual Ins. Co.*, 2 Md. 111; *Baxendale* v. *Harvey*, 4 H. & N. 445. The following cases have been held to be violations of this provision: the erection of new buildings near (*Murdock* v. *Chenango County Ins. Co.*, 2 N. Y. 210; *Francis* v. *Somerville Ins. Co.*, 25 N. J. 78); the putting of an oven into a house

(*Boatwright* v. *Ætna Ins. Co.*, 1 Strobh. [S. C.] 281); the introduction of new machinery (*Reid* v. *Gore Ins. Co.*, 11 Up. Can. 345); the removal of goods to a new place, and the use of an engine. *Barrett* v. *Jermy*, 3 W. H. & G. 535. But the occasional use of a dummy engine, as it had long been used, is not an increase. *Com* v. *Hide and Leather Ins. Co.*, 112 Mass. 136; 17 Am. Rep. 72. So, lighting with gasoline is not introducing a more hazardous business. *Ins. Co. of Chester County* v. *Coatesville Factory*, 80 Penn. St. 407. If there are two policies at one office, permission for a change under one will save a forfeiture under the other. *North Berwick Ins. Co.* v. *N. E. Ins. Co.*, 52 Me. 336. If the risk is increased, the policy becomes void, and it is immaterial whether the loss results from that cause. *Gardiner* v. *Piscataquis Ins. Co.*, 38 Me. 439; *Merriam* v. *Middlesex Ins. Co.*, 21 Pick. (Mass.) 162; *Lyman* v. *State Ins. Co.*, 14 Allen (Mass.), 329; *Mead* v. *N. W. Ins. Co.*, 7 N. Y. 530; *Glen* v. *Lewis*, 8 W. H. & G. 607. This provision may be limited by other more definite provisions as to increased risk under certain stated circumstances, as where it is provided that certain changes shall bear increase of the risk. *Mayor* v. *Hamilton Ins. Co.*, 10 Bosw. (N. Y.) 537; S. C., 39 N. Y. (12 Tiff.) 45; *Bowman* v. *Pacific Ins. Co.*, 27 Mo. 152; *Dittmer* v. *Germania Ins. Co.*, 23 La. Ann. 458. So, if the change was strictly forbidden, the question of increase of risk could not arise. *Lee* v. *Howard Ins. Co.*, 3 Gray (Mass.), 583; *Glen* v. *Lewis*, 8 W. H. & G. 607. The usual form of this provision is that the increase of risk avoids the policy, unless assented to by the insurer upon notice, but it may be given other forms. *Allen* v. *Massasoit Ins. Co.*, 99 Mass. 160. Minute changes which would not have influenced the insurer or caused him to demand increased rates of insurance are not within the clause. *Merriam* v. *Middlesex Ins. Co.*, 21 Pick. (Mass.) 162; *Girard Ins. Co.* v. *Stephenson*, 37 Penn. St. 293. If the policy is silent, any change in the surroundings and incidental circumstances is permissible within the limits of fair and honest dealing (*Stebbins* v. *Globe Ins. Co.*, 2 Hall [N. Y.], 632; *Grant* v. *Howard Ins. Co.*, 5 Hill [N. Y.], 10), and this, though it cause the loss. Where the insured was required to give notice of such change, that the insurers might terminate the policy, if they chose, a failure to do so does not make the policy void. *Joyce* v. *Maine Ins. Co.*, 45 Me. 168; *Stetson* v. *Mass. Ins. Co.*, 4 Mass. 330; *Com. Ins. Co.* v. *Mehlman*, 48 Ill. 313; *contra*, *Kern* v. *South St. Louis Ins. Co.*, 40 Mo. 19. That the alteration was made by a tenant is no excuse, for his possession is that of the landlord. *Diehl* v. *Adams County Ins. Co.*, 58 Penn. St. 443; *Fire Ass.* v. *Williamson*, 26 Penn. St. 196; *Howell* v. *Baltimore Eq. Soc.*, 16 Md. 377; *Appleby* v. *Fireman's Fund Ins. Co.*,

45 Barb. (N. Y.) 454. But, where the provision is only as to acts of the proprietor, an alteration by a tenant does not avoid the policy. *Padelford* v. *Providence Ins. Co.*, 3 R. I. 102. At the risk of the insured, was held in *Girard Ins. Co.* v. *Stephenson*, 37 Penn. St. 293, to mean that the insured shall assume the liability of the increased risk. A fire from that risk is then not covered. *Kingsley* v. *N. E. Ins. Co.*, 8 Cush. (Mass.) 393. Where there is no limitation, any business may be carried on not classed in the policy as extra hazardous (*Langdon* v. *Equitable Ins. Co.*, 1 Hall [N. Y.], 226; S. C., 6 Wend. 623; *Pim* v. *Reid*, 6 Man. & G. 1; *Shaw* v. *Robberds*, 6 Ad. & El. 75), if within the bounds of honesty and fair dealing. *Robinson* v. *Mercer County Ins. Co.*, 27 N. J. 134; *Wood* v. *Hartford Ins. Co.*, 13 Conn. 533; *Rafferty* v. *New Brunswick Ins. Co.*, 18 N. J. 480. Where the risks are divided into classes, the keeping of a more dangerous class of goods than that described in the policy, will avoid it. *Richards* v. *Protection Ins. Co.*, 30 Me. 273. The right to use a building for one hazardous purpose does not give the right to use it for another additional purpose in the same class (*Lee* v. *Howard Ins. Co.*, 3 Gray [Mass.], 583; *Washington Ins. Co.* v. *Merchants' Ins. Co.*, 5 Ohio St. 450), but an enlarged use is allowable. *Mayor* v. *Hamilton Ins. Co.*, 10 Bosw. (N. Y.) 537; *Baxendale* v. *Harvey*, 4 H. & N. 445. Where, from the character of the building and its use, it is necessary to have workmen constantly engaged in repairing, it is not a breach of a condition forbidding the working of carpenters. *Franklin Ins. Co.* v. *Chicago Ice Co.*, 36 Md. 102; 11 Am. Rep. 469. Use means habitual use. *Dobson* v. *Sotheby*, 1 Mood. & M. 90; *Barrett* v. *Jermy*, 3 W. H. & G. 535; *Matson* v. *Building Ins. Co.*, 9 Hun (N. Y.), 415; *Kelly* v. *Worcester Ins. Co.*, 97 Mass. 284; *Niagara Ins. Co.* v. *DeGraff*, 12 Mich. 124. Where a policy forbids a fire to be kept, lighting one to make repairs is not a breach. *Leggett* v. *Ætna Ins. Co.*, 10 Rich. (S. C.) L. 202. So, a kiln insured as in use for drying, may be occasionally used for other purposes. *Shaw* v. *Robberds*, 6 Ad. & El. 75. So of other occasional uses of the property insured. *O'Niel* v. *Buffalo Ins. Co.*, 3 N.Y. 122; *Grant* v. *Howard Ins. Co.*, 5 Hill (N.Y.), 10; *Gates* v. *Madison Ins. Co.*, 5 N. Y. (1 Seld.) 469; *Billings* v. *Tolland County Ins. Co.*, 20 Conn. 139; *Williams* v. *N. E. Ins. Co.*, 31 Me. 219; *Troy Ins. Co.* v. *Carpenter*, 4 Wis. 20. Where the use, though hazardous, pertains to the general subject-matter of the risk, there is no forfeiture. *Farmers' Ins. Co.* v. *Washington Ins. Co.*, 1 Hand (Ohio), 181. A description of the building occupied as a storehouse, will prevent its use for manufacturing. *Wall* v. *East River Ins. Co.*, 7 N. Y. (3 Seld.) 370; *Hervey* v. *Ins. Co.*, 11 U. C. C. P. 394. But a change from mak

ing carpets to making army blankets was held immaterial. *Smith* v. *Mechanics' Ins. Co.*, 32 N. Y. (5 Tiff.) 399. Where the character of the business was described with the words "and other extra-hazardous purposes" added, it was held that the meaning was other purposes of the same class. *Reynolds* v. *Commerce Ins. Co.*, 47 N. Y. (2 Sick.) 597. Articles may be kept for sale or manufacture, although the policy does not allow them to be stored. *Langdon* v. *N. Y. Equitable Ins. Co.*, 1 Hall (N. Y.); S. C., 6 Wend. 623; *Phœnix Ins. Co.* v. *Taylor*, 5 Minn. 492; *Rafferty* v. *N. B. Ins. Co.*, 18 N. J. 480; *Vogel* v. *People's Ins. Co.*, 9 Gray (Mass.), 23; *Hynds* v. *Schenectady Ins. Co.*, 16 Barb. (N. Y.) 119; S. C., 11 N. Y. (1 Kern.) 554; *Moore* v. *Protection Ins. Co.*, 29 Me. 97; *City Ins. Co.* v. *Corlies*, 21 Wend. (N. Y.) 367. Keeping a bar-room is not a use for innkeeping. *Rafferty* v. *N. B. Ins. Co.*, 18 N. J. 480. Keeping a bawdy-house, in a building described as a dwelling-house, is not a forfeiture. *Loehner* v. *Home Ins. Co.*, 17 Mo. 247; S. C., 19 Mo. 628. A change of tenants from a careful to a negligent one, or from a reputable to a disreputable one, is not a technical increase of risk. *Hobson* v. *Wellington Ins. Co.*, 6 Up. Can. 356; *Gates* v. *Madison County Ins. Co.*, 5 N. Y. (1 Seld.) 469; *Lyon* v. *Com. Ins. Co.*, 2 Rob. (La.) 266. That boarders were taken is not evidence of an increase of risk (*Manley* v. *Ins. Co. of N. A.*, 1 Lans. [N. Y.] 20), nor that a lottery was drawn in a building insured as a shoe manufactory. *Boardman* v. *Merrimack Ins. Co.*, 8 Cush. (Mass.) 583. The increase of risk is determined, not by the prior known use of the property, but by the description in the policy. *State Ins. Co.* v. *Arthur*, 30 Penn. St. 315. Where the provision is that, so long as the increased risk continues, the policy shall be of no force, it is suspended only. *N. E. Ins. Co.* v. *Wetmore*, 32 Ill. 221; *Phœnix Ins. Co.* v. *Lawrence*, 4 Metc. (Ky.) 9. Where, in a policy on merchandise with a condition against petroleum, it does not aid the policy that it was part of the usual stock. *Birmingham Ins. Co.* v. *Kroegher*, 83 Penn. St. 67.

§ 3. **Care of the property.** In the absence of express stipulation the insured is only bound to take such care of the property as honesty and good faith require. Careless or negligent men need the protection more than careful ones. Thus, leaving the premises unoccupied, which always increases the risk, does not, in the absence of express stipulation, affect the insurance. *Diehl* v. *Adams Co. Ins. Co.*, 58 Penn. St. 443; *O'Niel* v. *Buffalo Ins. Co.*, 3 N. Y. 122; *Joyce* v. *Maine Ins. Co.*, 45 Me. 168; *Gamwell* v. *Merchants' Ins. Co.*, 12 Cush. (Mass.) 167. But there is often a provision inserted which requires notice to and assent by the insurers, if the building is left

vacant. *Wustum* v. *City Ins. Co.*, 15 Wis. 138; *Harrison* v. *City Ins. Co.*, 9 Allen (Mass.), 231. A dwelling-house and barn are unoccupied when the house is only used for taking meals when the insured is engaged on a neighboring farm, and the barn is only used for the purpose of storing hay and farming tools. *Ashworth* v. *Builders' Ins. Co.*, 112 Mass. 422; 11 Am. Rep. 117. Where the building is a machine shop, it is unoccupied, if no practical use is made of it, though tools are stored there and some one goes there every day. *Keith* v. *Quincy Ins. Co.*, 10 Allen (Mass.), 228. But, to render a saw-mill vacant and unoccupied it must be abandoned. *Whitney* v. *Black River Ins. Co.*, 9 Hun (N. Y.), 37. If the owner and his family remove, the building is vacated, although they continue to pay rent and leave some furniture, and intend to return at some indefinite time. *Sleeper* v. *N. H. Ins. Co.*, 56 N. H. 401; *Corrigan* v. *Conn. Ins. Co.*, 122 Mass. 298. "Vacated by the removal of the occupant," refers to an entire abandonment of the house as a place of residence. *Cummins* v. *Agricultural Ins. Co.*, 67 N. Y. (22 Sick.) 260. A vacancy from January 12 to February 13 is thirty days. *Hartford Ins. Co.* v. *Webster*, 69 Ill. 392. There is no obligation to keep a watch in or about a vacant house. *Soye* v. *Merchants' Ins. Co.*, 6 La. Ann. 761. But it may be left vacant under such circumstances as to warrant a finding that it was done fraudulently. *Luce* v. *Dorchester Ins. Co.*, 105 Mass. 297. When it is stated that a clerk sleeps in the store, this is not a warranty that he shall continue to do so. *Frisbie* v. *Fayette Ins. Co.*, 27 Penn. St. 325. When it is warranted that a watchman shall be kept on the premises, it must be such a watchman as is kept in other like circumstances. Whether a suitable watch is kept is for the jury. *Crocker* v. *People's Ins. Co.*, 8 Cush. (Mass.) 79; *Hovey* v. *American Ins. Co.*, 2 Duer (N. Y.), 554; *Percival* v. *Maine Ins. Co.*, 33 Me. 242; *Parker* v. *Bridgeport Ins. Co.*, 10 Gray (Mass.), 302; *Power* v. *City Ins. Co.*, 8 Phil. 566. Where it is stated that there is a watchman nights, he must be there every night. *Sheldon* v. *Hartford Ins. Co.*, 22 Conn. 235; *Glendale Manuf. Co.* v. *Protection Ins. Co.*, 21 id. 19. So, if the time during which the watchman is present is stated, it must be strictly observed. *Ripley* v. *Ætna Ins. Co.*, 30 N. Y. (3 Tiff.) 136. Where it is stated that there is no watch, except people working in the mill during the night, there is no warranty that they shall continue to work at night. *Prieger* v. *Exchange Ins. Co.*, 6 Wis. 89. Though the watchman is excluded by legal process, it is a violation of a warranty that one is kept. *First Nat. Bank* v. *Ins. Co. of N. A.*, 50 N. Y. (5 Sick.) 45. Nor can a custom be shown to except certain rights. *Rip-*

ley v. *Ætna Ins. Co.*, 30 N. Y. (3 Tiff.) 136. The watchman may be in a part of the premises not insured, and where a record of his duty was required, it was held unnecessary where the insured had no means of keeping it as the insurer knew. *Andes Ins. Co.* v. *Shipman*, 77 Ill. 189. Where it was stated that the mill was examined thirty minutes after work, it was held that this examination must be kept up, and meant an examination after all work had ceased. *Houghton* v. *Manufacturers' Ins. Co.*, 8 Metc. (Mass.) 114. Where it is represented that a mill is worked by steam and by day only, the engine may be run at night. *Mayall* v. *Mitford*, 6 Ad. & El. 670. If ashes are required to be kept in brick, they may be kept in some equally safe way. *Underhill* v. *Agawam Ins. Co.*, 6 Cush. (Mass.) 440. A statement that a building has iron doors and shutters is no warranty that they shall be shut. *Scott* v. *Quebec Ins. Co.*, 1 Stuart (L. C.), 147. A substantial compliance with the promise of care is enough. Thus, the provisions for a supply of water in case of fire need not be literally complied with. Where it is represented that there are water-casks in each room, it is enough if casks of adequate size filled with water are kept, or any equally effectual mode of supplying water is provided. *Houghton* v. *Manufacturers' Ins. Co.*, 8 Metc. (Mass.) 114; *Aurora Ins. Co.* v. *Eddy*, 49 Ill. 106; *Gloucester Manuf. Co.* v. *Howard Ins. Co.*, 5 Gray (Mass.), 497. Under a warranty of force pumps ready for use, there must be some power to work them; but the pumps may be disabled by the fire. *Sayles* v. *N. W. Ins. Co.*, 2 Curt. (C. C.) 610. A representation that there are force pumps does not require hose. Buckets may be enough. *Peoria Ins. Co.* v. *Lewis*, 18 Ill. 553. The pumps need not always be ready. *Gillia* v. *Pawtucket Ins. Co.*, 8 R. I. 282.

§ 4. **Alienation.** As insurance is a personal contract, and must be supported by an interest in the subject insured, an alienation of the property terminates the insurance, unless at the time of loss the title has been revested in the insured. *Wilson* v. *Hill*, 3 Metc. (Mass.) 66; *Ætna Ins. Co.* v. *Tyler*, 16 Wend. (N. Y.) 385. A gift is an alienation. *McCarty* v. *Com. Ins. Co.*, 17 La. (O. S.) 365; *Langdon* v. *Farmers' Ins. Co.*, 22 Minn. 193. So is an absolute sale with a mortgage back to secure the purchase-money (*Home Ins. Co.* v. *Hauslein*, 60 Ill. 521; *Abbott* v. *Hampden Ins. Co.*, 30 Me. 414; *Savage* v. *Howard Ins. Co.*, 52 N. Y. [7 Sick.] 502; 11 Am. Rep. 741; *Grevemeyer* v. *Southern Ins. Co.*, 62 Penn. St. 340; 1 Am. Rep. 420); or a change from a mortgage to a deed, with a bond to reconvey (*Foote* v. *Hartford Ins. Co.*, 119 Mass. 259); or an assignment under the bankrupt act (*Young* v. *Eagle Ins. Co.*, 14 Gray [Mass.], 150; *Adams* v. *Rockingham Ins. Co.*, 29 Me. 292; *Perry* v. *Lorillard Ins. Co.*, 6 Lans. [N. Y.] 201;

Reynolds v. *Ins. Co.*, 34 Md. 280; 6 Am. Rep. 337); or a voluntary assignment and transfer of possession for the benefit of creditors. *Dey* v. *Poughkeepsie Ins. Co.*, 23 Barb. (N. Y.) 623; *Hazard* v. *Franklin Ins. Co.*, 7 R. I. 429; *Phœnix Ins. Co.* v. *Lawrence*, 4 Metc. (Ky.) 9. It is immaterial that the transfer may be voidable by creditors. *Dadmun Man. Co.* v. *Worcester Ins. Co.*, 11 Metc. (Mass.) 429; *Treadway* v. *Hamilton Ins. Co.*, 29 Conn. 68. An assignment in bankruptcy is a change of title by judicial decree. *Perry* v. *Lorillard Ins. Co.*, 61 N. Y. (19 Sick.) 214; 19 Am. Rep. 272. Usually the transfer is not so perfected as to be an alienation till the deeds are delivered. *McLaren* v. *Hartford Ins. Co.*, 5 N. Y. 151. The alienation must be such that at the time of the loss the insured has no insurable interest. *Lane* v. *Maine Ins. Co.*, 12 Me. 44; *Power* v. *Ocean Ins. Co.*, 19 La. (O. S.) 28; *Worthington* v. *Bearse*, 12 Allen (Mass.), 382; *Hitchcock* v. *N. W. Ins. Co.*, 26 N. Y. (11 Smith) 68. An agreement to sell is no alienation till the title has vested in the purchaser. *Masters* v. *Madison County Ins. Co.*, 11 Barb. (N. Y.) 624; *Davis* v. *Quincy Ins. Co.*, 10 Allen (Mass.), 113; *Trumbull* v. *Portage Ins. Co.*, 12 Ohio, 305; *Clinton* v. *Hope Ins. Co.*, 51 Barb. (N. Y.) 647; S. C., 45 N. Y. (6 Hand) 454; *Farmers' Ins. Co.* v. *Graybill*, 74 Penn. St. 17. On the same ground, delivery would be the ordinary test of alienation, in case of personal property. *Ætna Ins. Co.* v. *Jackson*, 16 B. Monr. (Ky.) 242; *Norcross* v. *Ins. Co.*, 17 Penn. St. 429; *Tallman* v. *Atlantic Ins. Co.*, 3 Keyes, 87. It has been held that a mortgage before foreclosure is not an alienation. *Shepherd* v. *Union Ins. Co.*, 38 N. H. 232; *Howard Ins. Co.* v. *Bruner*, 23 Penn. St. 500; *Rice* v. *Tower*, 1 Gray (Mass.), 426; *Smith* v. *Monmouth Ins. Co.*, 56 Me. 96; *contra*, *McCulloch* v. *Indiana Ins. Co.*, 8 Blackf. (Ind.) 50. A chattel mortgage stands on the same ground till there is a change of possession. *Holbrook* v. *Am. Ins. Co.*, 1 Curt. (C. C.) 193; *Van Deusen* v. *Charter Oak Ins. Co.*, 1 Robt. (N. Y.) 55; *Rice* v. *Tower*, 1 Gray (Mass.), 426; *Phœnix Ins. Co.* v. *Lawrence*, 4 Metc. (Ky.) 9. But a mortgage is an "alteration" of the ownership. *Edmands* v. *Mut. Safety Ins. Co.*, 1 Allen (Mass.), 311. It also violates a provision forbidding an alienation in whole or in part. *Abbott* v. *Hampden Ins. Co.*, 30 Me. 414. If the conveyance is absolute in form, it is an alienation, although there may be an agreement for redemption. *Western Mass. Ins. Co.* v. *Riker*, 10 Mich. 279. Where the property insured is a chattel, the statute notice for foreclosure is an entry, though no possession is taken. *McIntire* v. *Norwich Ins. Co.*, 102 Mass. 230; 3 Am. Rep. 458. Upon foreclosure the title becomes absolute in the mortgagee, and there is an alienation. *Macomber* v. *Cambridge Ins. Co.*, 8 Cush. (Mass.) 133; *McLaren* v. *Hartford Ins. Co.*, 5 N. Y. 151; *Mt. Vernon Man. Co.* v. *Sun-*

mit County Ins. Co., 10 Ohio St. 347. But where the insurance was by a mortgagee, a foreclosure makes no change of title as to him. *Bragg* v. *N. E. Ins. Co.*, 25 N. H. 289. A conditional sale, or any form of conveyance which is treated in equity as a mortgage, though absolute in form, comes under the same rule as a mortgage. *Tittemore* v. *Vermont Ins. Co.*, 20 Vt. 546; *Hodges* v. *Tenn. Ins. Co.*, 4 Seld. (N. Y.) 416; *Holbrook* v. *Am. Ins. Co.*, 1 Curt. (C. C.) 193; *Ayres* v. *Hartford Ins. Co.*, 21 Iowa, 193. A lease is not an alienation. *Lane* v. *Maine Ins. Co.*, 12 Me. 44; *West Branch Ins. Co.* v. *Helfenstein*, 40 Penn. St. 289. Nor is a seizure on execution by a sheriff. *Campbell* v. *Hamilton Ins. Co.*, 51 Me. 69; *Rice* v. *Tower*, 1 Gray (Mass.), 426; *Strong* v. *Manufacturers' Ins. Co.*, 10 Pick. (Mass.) 44. Nor proceedings to enforce a mechanic's lien. *Colt* v. *Phœnix Ins. Co.*, 54 N. Y. (9 Sick.) 595. Even where it is stipulated that a levy shall be deemed an alienation, it must be a levy which divests the title. *Pennebaker* v. *Tomlinson*, 1 Tenn. Ch. 598; *Ins. Co.* v. *O'Maley*, 82 Penn. St. 400. The object of this clause is said to be to prevent such a change of interest in the insured that he will have a greater temptation to burn the property, or a less interest in guarding it from fire. *Ayres* v. *Hartford Ins. Co.*, 17 Iowa, 176. It follows that the change provided against is a diminution of interest only, and never an increase. *Bragg* v. *N. E. Ins. Co.*, 25 N. H. 289; *Heaton* v. *Manhattan Ins. Co.*, 7 R. I. 502. After an assignment, to which the insurers assented, a sale by the person originally insured does not affect the policy. *Foster* v. *Equitable Ins. Co.*, 2 Gray (Mass.), 216; *Bragg* v. *N. E. Ins. Co.*, 25 N. H. 289; *Boynton* v. *Clinton Ins. Co.*, 16 Barb. (N. Y.) 254. Where property of different kinds is insured in one policy, as where a store and its contents are insured, an alienation of a part makes the policy void, equally with an alienation of the whole. *Barnes* v. *Union Ins. Co.*, 51 Me. 110; *Dix* v. *Mercantile Ins. Co.*, 22 Ill. 272; *Boynton* v. *Clinton Ins. Co.*, 16 Barb. (N. Y.) 254. Of course, this cannot apply to sales in the ordinary course of trade, which appear to have been contemplated in making the contract. And, in other cases, a sale of one lot was held not to affect the policy as to the rest. *Clark* v. *N. E. Ins. Co.*, 6 Cush. (Mass.) 342; *West Branch Ins. Co.* v. *Helfenstein*, 40 Penn. St. 289; *Com. Ins. Co.* v. *Spankneble*, 52 Ill. 53. The assignment of part of the mortgage debt does not make a policy issued to the mortgagee void. *Rex* v. *Ins. Co.*, 2 Phila. 357. A sale by one joint owner to another is not an alienation. *Hobbs* v. *Memphis Ins. Co.*, 1 Sneed (Tenn.), 444; *Hoffman* v. *Ætna Ins. Co.*, 1 Robt. (N. Y.) 501; S. C., 32 N. Y. (5 Tiff.) 405; *Pierce* v. *Nashua Ins. Co.*, 50 N. H. 297; 9 Am. Rep. 235; *contra*, *Buckley* v. *Garrett*, 47 Penn. St. 204. A sale of a part interest

is not an alienation. *Cowan* v. *Iowa State Ins. Co.*, 40 Iowa, 551; 20 Am. Rep. 583. But a mortgage of a part was held to be an alienation. *Plath* v. *Farmers' Ins. Co.*, 23 Minn. 479.

But the contrary has been held as to a dissolution of a firm, and a division of the property (*Dreher* v. *Ætna Ins. Co.*, 18 Mo. 128), or the withdrawal of one partner from the firm. *Dix* v. *Mercantile Ins. Co.*, 22 Ill. 272; *Keeler* v. *Niagara Ins. Co.*, 16 Wis. 523; *Hartford Ins. Co.* v. *Ross*, 23 Ind. 179; *Finley* v. *Lycoming County Ins. Co.*, 30 Penn. St. 311. So, a partition is a change of title. *Barnes* v. *Union Ins. Co.*, 51 Me. 110. Descent to heirs is not an alienation (*Burbank* v. *Rockingham Ins. Co.*, 24 N. H. 550), but is a change of title. *Lappin* v. *Charter Oak Ins. Co.*, 58 Barb. (N. Y.) 325.

§ 5. **Title, ownership, interest, incumbrance.** Property means the thing insured; title, the interest of the person insured in that property. *Springfield Ins. Co.* v. *Allen*, 43 N. Y. (4 Hand) 389; 3 Am Rep. 711; *Franklin Ins. Co.* v. *Coates*, 14 Md. 285. Words of description of the property will not be construed to apply to the title. *Rockford Ins. Co.* v. *Nelson*, 65 Ill. 415. The insured is not to state what his title is, unless it is required to be stated by the insurer. It is only essential that it shall in some true sense be his. *Sussex County Ins. Co.* v. *Woodruff*, 26 N. J. 541; *Curry* v. *Commonwealth Ins. Co.*, 10 Pick. (Mass.) 535; *Niblo* v. *N. A. Ins. Co.*, 1 Sandf. (N. Y.) 551; *Gould* v. *York County Ins. Co.*, 47 Me. 403; *Southern Ins. Co.* v. *Lewis*, 42 Ga. 587. A statement that his interest is an absolute one, is true where it is subject to no incumbrance or condition, as for example, the interest of a partner. *Irving* v. *Excelsior Ins. Co.*, 1 Bosw. (N. Y.) 507. Possession, and claiming and occupying as owner, is enough. *Franklin Ins. Co.* v. *Chicago Ice Co*, 36 Md. 102; 11 Am. Rep. 469; *Kansas Ins. Co.* v. *Berry*, 8 Kans. 159. If the true title is called for, the title must be set forth with substantial accuracy. It is not enough to entitle the insured to call the property his, that he has a bond for a deed (*Smith* v. *Bowditch Ins. Co.*, 6 Cush. [Mass.] 448; *Brown* v. *Williams*, 28 Me. 252; *Birmingham* v. *Empire Ins. Co.*, 42 Barb. [N. Y.] 457), nor is it sufficient to state that he is a stockholder in the corporation which owns it (*Philips* v. *Knox County Ins. Co.*, 20 Ohio St. 174; *Abbott* v. *Shawmut Ins. Co.*, 3 Allen [Mass.], 213), or a lessee, even with right to purchase (*Shaw* v. *St. Lawrence County Ins. Co.*, 11 Up. Can. 73; *Marshall* v. *Columbian Ins. Co.*, 27 N. H. 157), or that he is a mortgagee (*Jenkins* v. *Quincy Ins. Co.*, 7 Gray [Mass.], 370), or is one who has an imperfect tax title (*Pinkham* v. *Morang*, 40 Me. 587), or one who has conveyed the property and has an oral promise of a reconveyance (*Treadway* v. *Hamilton Ins.*

Co., 29 Conn. 68), or who is owner of only one of the tracts insured. *Day* v. *Charter Oak Ins. Co.*, 51 Me. 91. But one who was in possession and had paid all the purchase-money may state the true title to be in himself. *Chase* v. *Hamilton Ins Co.*, 22 Barb. (N. Y.) 527; *Reynolds* v. *State Ins. Co.*, 2 Grant (Penn.), 326. So of a sale where the property was destroyed before the delivery of the deed (*Gaylord* v. *Lamar Ins. Co.*, 40 Mo. 13), or an equitable title. *Farmers' Ins. Co.* v. *Fogelman*, 35 Mich. 481.

"Held by contract" does not import an absolute title (*McCulloch* v. *Norwood*, 58 N. Y. [13 Sick.] 562; *Vilas* v. *N. Y. Central Ins. Co.*, 9 Hun [N. Y.], 121), so of a statement that the insurer was a mortgagee, he being mortgagee in possession. *Wyman* v. *People's Equity Ins. Co.*, 1 Allen (Mass.), 301. Where the insured is required to state his interest if not absolute, it refers to the character of the interest only. Therefore, if the whole loss would be his, as in a case where he has made improvements under a contract to purchase, he has an absolute interest (*Hough* v. *City Ins. Co.*, 29 Conn. 10), or improvements under a lease of the land only (*David* v. *Hartford Ins. Co.*, 13 Iowa, 69; *Hope Ins. Co.* v. *Brolaskey*, 35 Penn. St. 282), or an interest in a building on leased land under a mechanic's lien. *Longhurst* v. *Conway Ins. Co.*, U. S. D. C. Iowa. "A less estate than a fee simple" refers to the duration of the estate, and an equitable fee simple is not a less estate. *Swift* v. *Vermont Ins. Co.*, 18 Vt. 305; *Pennebaker* v. *Tomlinson*, 1 Tenn. Ch. 598; *Leathers* v. *Farmers' Ins. Co.*, 24 N. H. 259. "A good and perfect unincumbered title is one good both at law and in equity, and does not exist, if there is an undischarged mortgage on the property. *Warner* v. *Middlesex Ass. Co.*, 21 Conn. 444; *contra*, *Hawkes* v. *Dodge County Ins. Co.*, 11 Wis. 188. Where a fee simple in the insured is required, an estate in his wife is not enough. *Eminence Ins. Co.* v. *Jesse*, 1 Metc. (Ky.) 523. A requirement that the applicant shall state his "whole title and ownership," does not call for a statement of incumbrances. *Taylor* v. *Ætna Ins. Co.*, 120 Mass. 254. The inquiries as to incumbrances, like other inquiries, as to title, are made that the insurer may know what interest the insured has in the preservation of the property, and also that mutual companies when they are given a lien may know the extent of their security. The existence and amount of incumbrances is material. *Friesmuth* v. *Agawam Ins. Co.*, 10 Cush. (Mass.) 587; *Gahagan* v. *Union Ins. Co.*, 43 N. H. 176; *Richardson* v. *Maine Ins. Co.*, 46 Me. 394. If the inquiry is as to the existence of an incumbrance, a general answer is enough. Any want of particularity will be waived by the issuing of the policy. *Nichols* v. *Fayette Ins. Co.*, 1 Allen (Mass.), 63. No

answer, is held a negative answer. *Loehner* v. *Home Ins. Co.*, 17 Mo. 247. If the insured undertakes instead of a general answer to give a particular one, he must give a true one. *Towne* v. *Fitchburg Ins. Co.*, 7 Allen (Mass.), 51; *Smith* v. *Empire Ins. Co.*, 25 Barb. (N. Y.) 497; *Battles* v. *York County Ins. Co.*, 41 Me. 208; *Hayward* v. *N. E. Ins. Co.*, 10 Cush. (Mass.) 444. The amount if stated should include interest. *Jacobs* v. *Eagle Ins. Co.*, 7 Allen (Mass.), 132. A mortgage is an incumbrance, though without consideration and voidable by creditors (*Treadway* v. *Hamilton Ins. Co.*, 29 Conn. 68), or unrecorded. *Hutchins* v. *Cleveland Ins. Co.*, 11 Ohio St. 477. So of a deed. *Phœnix Ins. Co.* v. *Mitchell*, 67 Ill. 43; *Allen* v. *Charlestown Ins. Co.*, 5 Gray (Mass.), 384. A lien for taxes (*Wilbur* v. *Bowditch Ins. Co.*, 10 Cush. [Mass.] 446), a mechanics' lien (*Longhurst* v. *Conway Ins. Co.*, U. S. D. C. Iowa), a levy of an attachment, (*Brown* v. *Commonwealth Ins. Co.*, 41 Penn. St. 187), a levy on execution (*Penn. Ins. Co.* v. *Gottsman*, 48 Penn. St. 151), an assessment by a mutual insurance company which has a lien for its payment (*Jackson* v. *Farmers' Ins. Co.*, 5 Gray [Mass.], 52), or a lien for a balance of the purchase-money (*Reynolds* v. *State Ins. Co.*, 2 Grant [Penn.], 326), are all incumbrances. But a bond to convey on which the money has not been paid (*Newhall* v. *Union Ins. Co.*, 52 Me. 180), is not an incumbrance. It is doubtful whether a remote contingency or possibility of change would be considered an incumbrance. *Jackson* v. *Farmers' Ins. Co.*, 5 Gray (Mass.), 52. If the interest insured is that of mortgagee, it may still be necessary to state any incumbrances on the property which would affect that interest. *Addison* v. *Kentucky Ins. Co.*, 7 B. Monr. (Ky.) 470; *Smith* v. *Columbia Ins. Co.*, 17 Penn. St. 253. Where the mortgage is delivered after the application and before the policy is issued, it need not be mentioned (*Howard Ins. Co.* v. *Bruner*, 23 Penn. St. 50; *Dutton* v. *N. E. Ins. Co.*, 29 N. H. 153), unless specially called for, as where notice was required of any incumbrance which would reduce the interest of the mortgagor below the sum insured. *Allen* v. *Hudson River Ins. Co.*, 19 Barb. (N. Y.) 442. But in all these cases, the fact that the mortgage was put upon the property immediately after the application would be a suspicious circumstance and call for explanation.

§ 6. **Premium and its payment.** As a rule, the contract provides that the insurance shall not attach till the premium is paid. *Flint* v. *Ohio Ins. Co.*, 8 Ohio, 501. The intent of the parties might limit a delivery in the same way where there was no such provision. *Bodine* v. *Exchange Ins. Co.*, 51 N. Y. (6 Sick.) 117; 10 Am. Rep. 566. There is sometimes a provision that the insurance shall be suspended while

a subsequent premium is overdue. *Wall* v. *Home Ins. Co.*, 36 N. Y. (9 Tiff.) 157. Any mode of payment accepted by the insurers or their authorized agent will be sufficient. Such is a check delivered or mailed to the agent by his direction (*Tayloe* v. *Merchants' Ins. Co.*, 9 How. [U. S.] 390); or a payment in depreciated funds, if according to the practice of the agent, and known to the principal. *Robinson* v. *International Ass. Soc.*, 42 N. Y. (3 Hand) 54; *Martine* v. *International Ass. Soc.*, 62 Barb. (N. Y.) 181; S. C., 53 N. Y. (8 Sick.) 339; *Sands* v. *N. Y. Ins. Co.*, 50 N. Y. (5 Sick.) 626; 10 Am. Rep. 535; *Polglass* v. *Oliver*, 2 Cr. & Jer. 14. A tender is equivalent to a payment, if the premium could have been paid in the funds tendered. *N. Y. Ins. Co.* v. *Clopton*, 7 Bush (Ky.), 179; 3 Am. Rep. 290. A note may be given and accepted as payment. *Pitt* v. *Berkshire Ins. Co.*, 100 Mass. 500. A subsequent parol agreement waiving the condition as to forfeiture is valid. *Baptist Church* v. *Brooklyn Ins. Co.*, 19 N. Y. (5 Smith) 305. But such agreement made at the time of the issue of policy could not be proved, nor a usage of the company to allow days of grace. *Howell* v. *Knickerbocker Ins. Co.*, 44 N. Y. (5 Hand) 276; 4 Am. Rep. 675. But proof of such usage was admitted in *Helme* v. *Phil. Ins. Co.*, 61 Penn. St. 107. By agreement, payment has been made in advertising (*Kentucky Ins. Co.* v. *Jenks*, 5 Ind. 96); or in board. *Schwartz* v. *Germania Ins. Co.*, 18 Minn. 448. In these cases, unless it is otherwise agreed, the board or advertising would be furnished simultaneously with the insurance. The acceptance of property instead of money by the agent does not bind the company. *Hoffman* v. *Hancock Ins. Co.*, 92 U. S. 161. Where the premium falls due on Sunday, it may be paid the next day. *Hammond* v. *American Ins. Co.*, 10 Gray (Mass.), 306; *Campbell* v. *International Ass. Soc.*, 4 Bosw. (N. Y.) 298. The recital in the policy that the premium has been paid is *prima facie* evidence of payment. *Pitt* v. *Berkshire Ins. Co.*, 100 Mass. 500; *Sheldon* v. *Atlantic Ins. Co.*, 26 N. Y. (12 Smith) 460; *N. E. Ins. Co.* v. *Hasbrook*, 32 Ind. 447; *contra*, *Provident Ins. Co.* v. *Fennell*, 40 Ill. 398; *Michael* v. *Nashville Ins. Co.*, 10 La. Ann. 737; *Troy Ins. Co.* v. *Carpenter*, 4 Wis. 20. In other cases it has been held that it cannot be denied for the purpose of defeating the policy. *Madison* v. *Fellows*, 1 Disn. (Ohio) 217; S. C., 2 id. 128; *Cons. Ins. Co.* v. *Cashow*, 41 Md. 59; *Ill. Cent. Ins. Co.* v. *Wolf*, 37 Ill. 354; *Teutonia Ins. Co.* v. *Anderson*, 77 Ill. 384. The payment of the premium may be waived by the agent, as by an assurance that the payment makes no difference. *Bragdon* v. *Appleton Ins. Co.*, 42 Me. 259; *Bodine* v. *Exchange Ins. Co.*, 51 N. Y. 117; 10

Am. Rep. 566. But a broker's assurance that it would be safe for thirty days without payment does not save the policy. *Marland* v. *Royal Ins. Co.*, 71 Penn. St. 393. If time is given and it passes without payment, the insurer is discharged. *Bergson* v. *Builders' Ins. Co.*, 38 Cal. 541. So the agent may himself pay the insurer and look to the insured as his personal debtor, even if the policy requires a payment before the policy is valid. *Sheldon* v. *Conn. Ins. Co.*, 25 Conn. 207; *Marsh* v. *N. W. Ins. Co.*, 3 Biss. (C. C.) 351; *Home Ins. Co.* v. *Curtis*, 32 Mich. 402. But where the premium must be actually received at the office, a payment to an agent is not enough (*Mulrey* v. *Shawmut Ins. Co.*, 4 Allen [Mass.], 116); or, if the agent being indebted to the insured agrees to pay it, but does not. *Ferebee* v. *N. C. Ins. Co.*, 68 N. C. 11. If the money to pay the premium is in the bank, and the agent tells the insured to let it lie till he draws for it, and he draws after the loss, it is a good payment. *N. Y. Central Ins. Co.* v. *Nat. Protection Ins. Co.*, 20 Barb. (N. Y.) 468; *Hallock* v. *Com. Ins. Co.*, 26 N. J. 268. The delivery of the policy without payment, or other circumstances, may be evidence for the jury of a waiver. *Wood* v. *Poughkeepsie Ins. Co.*, 32 N. Y. 619; *Bouton* v. *Am. Ins. Co.*, 25 Conn. 542; *Miller* v. *Brooklyn Ins. Co.*, 12 Wall. (U. S.) 288; *Heaton* v. *Manhattan Ins. Co.*, 7 R. I. 502; *Goit* v. *Nat. Prot. Ins. Co.*, 25 Barb. (N. Y.) 189; *Ins. Co.* v. *Colt*, 20 Wall. (U. S.) 560. A custom in which the insurer has a share, to allow thirty days for the payment of the premium, is binding (*Helme* v. *Phil. Ins. Co.*, 61 Penn. St. 107); or to consider the contract valid without payment. *Baxter* v. *Massasoit Ins. Co.*, 13 Allen (Mass.), 320; *Pino* v. *Merchants' Ins. Co.*, 19 La. Ann. 214. But a demand or even a suit for the premium does not save the policy (*Edge* v. *Duke*, 18 Law Jour. Ch. 183); nor the collection of a previous assessment. *Nash* v. *Union Ins. Co.*, 43 Me. 343. Acceptance of a premium is a waiver of any previous cause of forfeiture known to the insurer (*Bevin* v. *Conn. Ins. Co.*, 23 Conn. 244; *Lycoming County Ins. Co.* v. *Schollenberger*, 44 Penn. St. 259; *Jolliffe* v. *Madison Ins. Co.*, 39 Wis. 111; 20 Am. Rep. 35; *Wing* v. *Harvey*, 5 De G., M. & G. 265); and this is so even if the policy states that if payment is received after the day, it is only done as an act of courtesy or grace. *Thompson* v. *St. Louis Ins. Co.*, 52 Mo. 469. Where fifteen days are allowed for payment, and the insurers not to be liable till payment, the premium cannot be paid after loss within the fifteen days. *Bradley* v. *Potomac Ins. Co.*, 32 Md. 108; 3 Am. Rep. 121.

§ 7. **Other insurance.** The same reasons which lead companies to limit the amount of their insurance by the value of the insured's in-

terest in the property, and to guard against any decrease of that interest, apply equally whether the insurance is all put upon the property by them, or a part by another insurer. The temptation to fraud in either case is equal. The whole amount of insurance upon the property, both at the beginning and during the continuance of their contract, is material, and they have a right to require it to be disclosed. *Hutchinson* v. *Western Ins. Co.*, 21 Mo. 97; *Obermeyer* v. *Globe Ins. Co.*, 43 id. 573. The additional insurance, to work a forfeiture, must be upon the same interest and must also be valid, although it would seem that the temptation to fraud would be the same, even if the additional insurance could not be collected. *Tyler* v. *Ætna Ins. Co.*, 12 Wend. (N. Y.) 507; S. C., 16 id. 385; *Sloat* v. *Royal Ins. Co.*, 49 Penn. St. 14; *Nichols* v. *Fayette Ins. Co.*, 1 Allen (Mass.), 63; *Harris* v. *Ohio Ins. Co.*, 5 Ohio, 466; *Lindley* v. *The Union Ins. Co.*, 65 Me. 368; 20 Am. Rep. 701; *Franklin Ins. Co.* v. *Drake*, 2 B. Monr. (Ky.) 47. Subsequent insurance, which is void by its own terms, because it is additional and without notice of the prior insurance, is not within the provision, for it never attached on the property. *Stacey* v. *Franklin Ins. Co.*, 2 Watts & S. (Penn.) 506; *Gale* v. *Belknap Ins. Co.*, 41 N. H. 170; *Schenck* v. *Mercer County Ins. Co.*, 24 N. J. 447; *Thomas* v. *Builders' Ins. Co.*, 119 Mass. 121; 20 Am. Rep. 317; *Hand* v. *Williamsburg Ins. Co.*, 57 N. Y. (12 Sick.) 41. So if the second policy is void for any other reason. *Jackson* v. *Farmers' Ins. Co.*, 5 Gray (Mass.), 52. If the insurance is only voidable at the election of the insurer, it would seem that it must come within the provision. *Bigler* v. *N. Y. Central Ins. Co.*, 22 N. Y. (8 Smith) 402; *Ramsay* v. *Mut. Ins. Co.*, 11 Up. Can. 516; *David* v. *Hartford Ins. Co.*, 13 Iowa, 69; *Lackey* v. *Georgia Home Ins. Co.*, 42 Ga. 456; *Mitchell* v. *Lycoming Ins. Co.*, 51 Penn. St. 402. In other cases, the other insurance was held to make the policy voidable only. *Atlantic Ins. Co.* v. *Goodall*, 35 N. H. 328. So it was held that if the other insurance expired before the loss, the policy was good. *N. E. Ins. Co.* v. *Schettler*, 38 Ill. 166. Where subsequent insurance "valid or not" was prohibited, the question of its validity does not arise. *Gee* v. *Cheshire County Ins. Co.*, 55 N. H. 65; 20 Am. Rep. 171. Other insurance by a stranger will not make the policy void (*Ætna Ins. Co.* v. *Tyler*, 16 Wend. [N. Y.] 385; *Rowley* v. *Empire Ins. Co.*, 36 N. Y. [9 Tiff.] 550), unless ratified by the owner. *Dafoe* v. *Johnson District Ins. Co.*, 7 U. C. 65. That the second insurers do not resist but pay the loss makes no difference. *Lindley* v. *Union Ins. Co.*, 65 Me. 368; 20 Am. Rep. 701. If a policy requiring notice of prior insurance is assigned to one who holds other insurance, it will become

void. *Leavitt* v. *Western Ins. Co.*, 7 Robt. (La.) 351. If two policies are made out and delivered together by insurers co-operating, the clause does not apply. *Washington Ins. Co.* v. *Davison*, 30 Md. 91; *Sherman* v. *Madison Ins. Co.*, 39 Wis. 104. It is not necessary that the subject-matter insured be in all respects identical. Thus, if the new policy covers the whole house of which an undivided interest was before insured, it will make the insurance void. *Columbus Ins. Co.* v. *Walsh*, 18 Mo. 229; *Liscom* v. *Boston Ins. Co.*, 9 Mete. (Mass.) 205; *Mussey* v. *Atlas Ins. Co.*, 14 N. Y. (4 Kern.) 79. So if the new policy embraces more property than the old. *Ramsay* v. *Mut. Ins. Co.*, 11 Up. Can. 516; *McMahon* v. *Portsmouth Ins. Co.*, 22 N. H. 15; *Walton* v. *La. St. Ins. Co.*, 2 Robt. (La.) 563; *contra*, *Sloat* v. *Royal Ins. Co.*, 49 Penn. St. 14. Where a warehouseman insures generally all goods in his hands and the owner also insures his goods, it is unsettled whether it is double insurance. That it is: *Hough* v. *People's Ins. Co.*, 36 Md. 398. That it is not: *Donaldson* v. *Manchester Ins. Co.*, 14 Ct. of Sess. Cas. (Sc.) 601. The interests of mortgagor and mortgagee are distinct and may be separately insured unless both are at the expense and for the benefit of the mortgagor. *Holbrook* v. *Am. Ins. Co.*, 1 Curt. (C. C.) 193; *Fox* v. *Phœnix Ins. Co.*, 52 Me. 333; *Ins. Co. of N. A.* v. *McDowell*, 50 Ill. 120; *Adams* v. *Greenwich Ins. Co.*, 9 Hun (N. Y.), 47. The interests of joint owners are insurable separately. *Franklin Ins. Co.* v. *Drake*, 2 B. Monr. (Ky.) 47. Where other insurance on property connected with the building insured is prohibited or is forbidden, goods within the building are not within the clause. *Jones* v. *Maine Ins. Co.*, 18 Me. 155; *Illinois Ins. Co.* v. *O'Neile*, 13 Ill. 89. The identity of the property insured may be matter for parol evidence. *Stacey* v. *Franklin Ins. Co.*, 2 W. & S. (Penn.) 506; *Clark* v. *Hamilton Ins. Co.*, 9 Gray (Mass.), 148; *Storer* v. *Elliot Ins. Co.*, 45 Me. 175. Where the policy requires notice of subsequent insurance, if the mode of notice is prescribed, that must be given. *Healey* v. *Imperial Ins. Co.*, 5 Nev. 268; *Worcester Bank* v. *Hartford Ins. Co.*, 11 Cush. (Mass.) 265. Otherwise parol notice is enough. *McEwen* v. *Montgomery County Ins. Co.*, 5 Hill (N. Y.), 101; *Schenck* v. *Mercey County Ins. Co.*, 24 N. J. 447. But accidental information which reaches the company or even speaking of the insurance incidentally in conversation is not enough. *Eureka Ins. Co.* v. *Robinson*, 56 Penn. St. 256. The requirement of written notice may be waived. *Cobb* v. *Ins. Co. of N. A.*, 11 Kan. 93; *Hayward* v. *Nat. Ins. Co.*, 52 Mo. 181; 14 Am. Rep. 400; *Carrugi* v. *Atlantic Ins. Co.*, 40 Ga. 135; 2 Am. Rep. 567; *contra*, *Hall* v. *Mechanics' Ins. Co.*, 6 Gray (Mass.), 185; *Couch* v. *City Ins. Co.*, 38 Conn. 181;

9 Am. Rep. 375. The notice must be given within a reasonable time and that is a question for the court, unless the facts are in dispute. *Jacobs* v. *Equitable Ins. Co.*, 19 Up. Can. 250; *Kimball* v. *Howard Ins. Co.*, 8 Gray (Mass.), 33. Notice seven months after the loss is too late, and so is nineteen days unexplained delay. *Mellen* v. *Hamilton Ins. Co.*, 5 Duer (N. Y.), 101; S. C., 17 N. Y. (3 Smith) 609. If the notice gives the amount and no questions on other points are asked, it is enough. *Benjamin* v. *Saratoga County Ins. Co.*, 17 N. Y. (3 Smith) 415. In *Inland Ins. Co.* v. *Stauffer*, 33 Penn. St. 397, it was held that notice should be given when the subsequent insurance is applied for a few days before the loss, but the policy was delivered afterward. Where the notice is required to be in writing and indorsed on the policy, parol notice is not enough. *Worcester Bank* v. *Hartford Ins. Co.*, 11 Cush. (Mass.) 265; *Stark County Ins. Co.* v. *Hurd*, 19 Ohio, 149; *Carpenter* v. *Providence Ins. Co.*, 16 Pet. (U. S.) 495. But in other cases, the more liberal rule is adopted that if the company or its agent had actual notice and made no objection, it cannot afterward insist that the notice and their assent should have been in writing. *Thompson* v. *St. Louis Ins. Co.*, 52 Mo. 469; *Viele* v. *Germania Ins. Co.*, 26 Iowa, 9; *Van Bories* v. *United Ins. Co.*, 8 Bush (Ky.), 133; *Peck* v. *New London Ins. Co.*, 22 Conn. 584; *Hutton* v. *Beacon Ins. Co.*, 16 Up. Can. 316; *National Ins. Co.* v. *Crane*, 16 Md. 260. If the previous insurance is in the same company, there is no forfeiture for they are held to know their own acts. *Barnes* v. *Union Ins. Co.*, 45 N. H. 21; *Horwitz* v. *Equitable Ins. Co.*, 40 Mo. 557; *Rowley* v. *Empire Ins. Co.*, 36 N. Y. 550. Where both policies are got of one agent who is agent for both insurers, the effect is the same. *Van Bories* v. *United Ins. Co.*, 8 Bush (Ky.), 133; *Washington Ins. Co.* v. *Davison*, 30 Md. 91. But in case the insurance was procured by a broker it is not so. *Mellen* v. *Hamilton Ins. Co.*, 5 Duer (N. Y.), 101; S. C., 17 N. Y. (3 Smith) 609. Where the assent of the company in writing is required, a letter from the secretary acknowledging notice without more is enough. *Potter* v. *Ontario Ins. Co.*, 5 Hill (N. Y.), 147; *Robertson* v. *French*, 4 East, 130. The officer named in the charter and by-laws must assent. *Stark County Ins. Co.* v. *Hurd*, 19 Ohio, 149. Where the consent of the directors is required it need not be in writing, or by any formal vote, but may be proved by any circumstantial evidence. Leave to keep a certain amount of insurance on the property is a waiver of all requirements of notice or assent up to that amount. *Blake* v. *Exchange Ins. Co.*, 12 Gray (Mass.), 265; *Philbrook* v. *N. E. Ins. Co.*, 37 Me. 137; *Warner* v. *Peoria Ins. Co.*, 14 Wis. 318. A statement of prior in-

surance in the policy is a written assent to it (*Baptist Soc.* v. *Hillsborough Ins. Co.*, 19 N. H. 580), but not to the same insurance in other companies. *Conway Tool Co.* v. *Hudson River Ins. Co.*, 12 Cush. (Mass.) 144. Assent to other insurance includes leave to keep it alive by renewals or new policies. *Brown* v. *Cattaraugus County Ins. Co.*, 18 N. Y. (4 Smith) 385. Where the amount was increased and a new policy in another company taken, new assent was required. *Burt* v. *People's Ins. Co.*, 2 Gray (Mass.), 397; *Shurtleff* v. *Phœnix Ins. Co.*, 57 Me. 137. Where insurance to two-thirds the estimated value is allowed, an increase in the value of the property does not authorize more insurance. *Elliott* v. *Lycoming Ins. Co.*, 66 Penn. St. 22; 5 Am. Rep. 323. Where the amount was reduced within the limit before loss, a recovery was allowed. *Obermeyer* v. *Globe Ins. Co.*, 43 Mo. 573. Where notice of changes is required, it must be given of a different subdivision of the sum insured in a renewal. *Simpson* v. *Penn. Ins. Co.*, 38 Penn. St. 250. If the company in any way recognize the policy as valid after knowledge of a breach, it is a ratification. *Barnes* v. *Union Ins. Co.*, 45 N. H. 21. Where there is only a right to avoid the policy, the insurers must take advantage of the breach within a reasonable time. *Van Bories* v. *United Ins. Co.*, 8 Bush (Ky.), 133.

§ 8. **Assigning the policy.** With reference to assignments of the policy, as we have seen, they can be only made to some person who has an interest in the matter insured. Next, there is here a distinction between policies of marine insurance, and policies of insurance against fire. The former are transferable without the consent of the insurer. The latter cannot be transferred, so that the assignee will have any right to enforce them in his own name without a new contract with the insurers. *Ætna Ins. Co.* v. *Taylor*, 16 Wend. (N. Y.) 385; *Columbian Ins. Co.* v. *Lawrence*, 2 Pet. (U. S.) 25; *Lynch* v. *Dalzell*, 4 Brown's P. C. 431; *Simeral* v. *Dubuque Ins. Co.*, 18 Iowa, 319. An assignment may be of the contract, in which case the assignee must have an interest in the subject-matter, or it may be a mere order to pay the sum insured to some person, if any loss occurs, in which case the assignor remains the insurer and the assignment is only a collateral contract. *Hogg* v. *Middlesex Ins. Co.*, 10 Cush. (Mass.) 337. As most policies contain a provision making the contract void in case of assignment, it is important to consider what is an assignment within this clause. An alienation of the property is not alone an assignment. *Phillips* v. *Merrimack Ins. Co.*, 10 Cush. (Mass.) 350; *Stout* v. *City Ins. Co.*, 12 Iowa, 371. Even with an agreement to assign the policy (*Wheeling Ins. Co.* v. *Morrison*, 11 Leigh [Va.], 354; *Pierce* v. *Nashua Ins. Co.*, 50 N.

H. 297; 9 Am. Rep. 235); nor a mortgage with an agreement to hold the policy for the benefit of the mortgagee (*Prows* v. *Ohio Valley Ins. Co.*, 2 Cin. [Ohio] 14); nor an unexecuted agreement to assign, whether parol or written (*Cromwell* v. *Brooklyn Ins. Co.*, 39 Barb. [N. Y.] 227; *Smith* v. *Monmouth Ins. Co.*, 50 Me. 96); nor a pledge of the policy (*Ellis* v. *Kreutzinger*, 27 Mo. 311); nor a general assignment for the benefit of creditors (*People* v. *Beigler*, 1 Hill & Den. [N. Y.] 133; *Lazarus* v. *Com. Ins. Co.*, 5 Pick. [Mass.] 76); nor a direction to pay some third party as mortgagee; nor an indorsement signed by the insured, "Pay to A," and delivery. *Russ* v. *Waldo Ins. Co.*, 52 Me. 187. The mortgagee, or person to whom the policy is payable, only gains an equitable right to receive any sum which may be due after a loss. *Brown* v. *Hartford Ins. Co.*, 5 R. I. 394. As soon, however, as the loss has occurred, he becomes the party in interest, and the insurer in settling the loss must deal with him, and not with the insured. *State Ins. Co.* v. *Roberts*, 31 Penn. St. 438; *Edes* v. *Hamilton Ins. Co.*, 3 Allen (Mass.), 362; *Buffalo Works* v. *Sun Ins. Co.*, 17 N. Y. (3 Smith) 401; *Pupke* v. *Resolute Ins. Co.*, 17 Wis. 378; *Hoxsie* v. *Providence Ins. Co.*, 6 R. I. 517 An assignment after loss is not within the prohibition (*Courtney* v. *New York City Ins. Co.*, 28 Barb. [N. Y.] 116; *Carter* v. *Humboldt Ins. Co.*, 12 Iowa, 287), and any provision forbidding it is against public policy and void. *West Branch Ins. Co.* v. *Helfenstein*, 40 Penn. St. 289. Unless the policy in terms forbids a partial transfer, no assignment which does not deprive the assignor of all interest in the property will avoid the policy. *Shearman* v. *Niagara Ins. Co.*, 2 Sweeny (N. Y.), 470; *Hitchcock* v. *N. W. Ins. Co.*, 26 N. Y. (12 Smith) 68. Where there was a provision that assent should be given to an assignment upon notice, there being also a provision against sale, no assent can be required unless the sale also has been assented to. *Home Ins. Co.* v. *Lindsey*, 26 Ohio St. 348. After the assurers have assented to an assignment, it becomes a new contract, which the assignee may enforce in his own name (*Buckley* v. *Garrett*, 47 Penn. St. 204; *Wolfe* v. *Security Ins. Co.*, 39 N. Y. [12 Tiff.] 49), and the acts of the assignor cannot affect it. *Boynton* v. *Clinton Ins. Co.*, 16 Barb. (N. Y.) 254. The assent may be given by the secretary of an insurance company if there is no express provision making it the duty of any other officer, even though the president is required to sign all policies. *N. E. Ins. Co.* v. *De Wolf*, 8 Pick. (Mass.) 56. Where the assent of the directors is required, it will be presumed, if the secretary has assented, and entered the transaction on the books, and no objection has been made by them, no formal vote is necessary. *Durar* v. *Hudson County Ins. Co.*, 24 N. J. L. 171. The habit of the officers

known to them is sufficient. *Phillips* v. *Merrimack Ins. Co.*, 10 Cush. (Mass.) 350. Even an agent may keep the policy good till the insurer can act upon it. *Ill. Ins. Co.* v. *Stanton*, 57 Ill. 354. Where it appears on the policy that the insurer has acted on the assignment, as where the assignee is made payee, it is enough. *National Ins. Co.* v. *Crane*, 16 Md. 260; *Keeler* v. *Niagara Ins. Co.*, 16 Wis. 523; *Brown* v. *Roger Williams Ins. Co.*, 5 R. I 394; *Franklin* v. *National Ins. Co.*, 43 Mo. 491. Changes in a partnership firm have been held not to come within the rule as to assignments. *Wilson* v. *Genesee Couny Ins. Co.*, 16 Barb. (N. Y.) 511. But see, *contra*, *Tillou* v. *Kingston Mutual Ins. Co.*, 5 N. Y. (1 Seld.) 405. Where the policy was originally void, an assent to an assignment does not make it good. The assignee is no better off than the assignor. *Eastman* v. *Carroll County Ins. Co.*, 45 Me. 307; *Citizens' Ins. Co.* v. *Doll*, 35 Md. 89; 6 Am. Rep. 360. But where the policy is only voidable, it might, with other circumstances showing that it was done knowingly, be evidence of a ratification. *Barnes* v. *Union Ins. Co.*, 45 N. H. 21. The assent may be conditional, and in such case the condition must be performed strictly. *Smith* v. *Saratoga Ins. Co.*, 3 Hill (N. Y.), 508. Where the assignee has thirty days in which to secure the assent of the company, they cannot refuse it without cause. *Boynton* v. *Farmers' Ins. Co.*, 43 Vt. 256; 5 Am. Rep. 276. Consent to a sale and assignment, given afterward, is enough. *Buchanan* v. *Exchange Ins. Co*, 61 N. Y. (16 Sick.) 26. A parol assignment, with a delivery of the policy, is good between the parties. *Bibend* v. *London Ins. Co.*, 30 Cal. 78. After a loss, an order is a valid assignment. *Hall* v. *Dorchester Ins. Co.*, 111 Mass. 53; 15 Am. Rep. 1; *Lapeyre* v. *Thompson*, 7 La. Ann. 218. Possession of the policy is *prima facie* evidence of title to it. *Wood* v. *Phœnix Ins. Co.*, 22 La. Ann. 617. But delivery is not always essential. The court may rely upon other circumstances. *Palmer* v. *Merrill*, 6 Cush. (Mass.) 282; *In re Styan*, 1 Phil. Ch. 105; *Neale* v. *Molineux*, 2 C. & K. 672. Even as against one who has advanced money on the policy without notice. Id. A letter, expressing a wish to assign, received by the insurers and entered on their books, was held a good assignment against a subsequent assignee, who had possession of the policy. *Chowne* v. *Baylis*, 31 Beav. 351. A mere notice entered on the insurer's books to send letters about the policy to a third person is not evidence of an assignment valid in bankruptcy. *West* v. *Reid*, 2 Hare, 249. A deposit of the policy with a letter promising to assign was held a good assignment without notice to the insurer. *Cook* v. *Black*, 1 Hare, 390; *Jones* v. *Cms. Ins. Co.*, 26 Beav. 256. So of even a bare deposit of the policy (*Moore* v. *Woolsey*, 4 El. & Bl. 243),

and the words in the policy, "legally assigned," add nothing and mean only lawfully assigned. *Dufaur* v. *Prof. Ass. Co.*, 25 Beav. 603. No notice to the insurers is necessary unless required by the policy. *Mut. Prot. Ins. Co.* v. *Hamilton*, 5 Sneed (Tenn.), 269. Where notice is required, it may, in the absence of other provision, be oral (*North British Ins. Co.* v. *Hallett*, 7 Jur. [N. S.] 1263; *Gale* v. *Lewis*, 9 Q. B. 742) to an agent (Id.), in any form of words. *Ex parte Staght*, 2 Dra. & Chit. 314. A mere incidental mention, to one especially who was only a clerk, has been held not enough. *Edwards* v. *Scott*, 2 Scott, 266; 1 M. & G. 962; *Edwards* v. *Martin*, L. R., 1 Eq. 121; *North British Ins. Co.* v. *Hallett*, 7 Jur. (N. S.) 1263. An assignment of part only cannot be enforced. May on Ins., § 399.

§ 9. **Reinsurance.** Reinsurance is a contract wholly collateral to the original insurance. *Herckenrath* v. *American Ins. Co.*, 3 Barb. (N. Y.) Ch. 63. The insured is no party to it, and it does not in any way increase or decrease his rights. If the insurer is insolvent, while the reinsurer is able, and does pay the loss, it does the insured no good. *Hone* v. *Mutual Safety Ins. Co.*, 1 Sandf. (N. Y.) 137. See *Blackstone* v. *Allemania Ins. Co.*, 4 Daly, 299; 56 N. Y. (11 Sick.) 104. It is a relation with which only the insurer and reinsurer have any concern. It is evident that all the benefits resulting from it would be equally obtained, in most, or all cases, if the insured made the contract originally with the reinsurer. Reinsurance is prohibited in England. *Andree* v. *Fletcher*, 2 T. R. 161. In the ordinary contract of reinsurance, the reinsurer undertakes with reference to the insurer, what he undertakes with reference to the insured, and subject to like rights, duties and obligations. The first condition of the contract is, that there shall be a valid original contract of insurance. If the insurer is not bound, he has no interest in the loss, and without such interest the reinsurance must be void. *Carpenter* v. *Providence Ins Co.*, 16 Pet. (U. S.) 495. The reinsurer may, therefore, defend by proving that the original reinsurance was void. It would even seem that he may claim that the insurer shall avoid it where it is voidable. *N. Y. Ins. Co.* v. *Prot. Ins. Co.*, 1 Story (C. C.), 458; *Eagle Ins. Co.* v. *Lafayette Ins. Co.*, 9 Ind. 443. The reinsured must prove the policy, the loss, and all the steps which are necessary to make out a complete legal liability from himself to the insured, in the same manner that the insured himself must have done. 3 Kent's Com. 279. But he need not prove either that he has paid, or can pay, or even that he intends to pay the loss to the insured. *Hone* v. *Mutual Safety Ins. Co.*, 1 Sandf. (N. Y.) 137; *Blackstone* v. *Alemannia Ins. Co.*, 56 N. Y. 104; *Fame Ins. Co.'s Appeal*, 83 Penn. St. 396. If the reinsurance is for a part only of the

sum originally insured, and the loss is a partial one, yet the reinsurer must pay the whole, and cannot prove a usage to pay only a proportionate part, unless there is a provision that the loss shall be payable *pro rata*. Id. Where the loss was payable *pro rata*, at the same time and in the same manner as by the reinsured, the reinsurer was only held for such sum as the reinsured actually paid. *Illinois Ins. Co.* v. *Andes Ins. Co.*, 67 Ill. 362; 16 Am. Rep. 620. If the insurer resists the claim in good faith, the reinsurer will be liable to him for the costs and expenses after notice. *N. Y. State Ins. Co.* v. *Prot. Ins. Co.*, 1 Story (C. C.) 458; *Hastie* v. *De Peyster*, 3 Cai. (N. Y.) 190. The same obligations of good faith exist between the insurer and the reinsurer as between the original parties, and the insurer must communicate all material facts within his knowledge, or the policy will be void. *Bowery Ins. Co.* v. *N. Y. Ins. Co.*, 17 Wend. (N. Y.) 359. In a policy of reinsurance any provision as to other insurance means other insurance of a like kind, that is, reinsurance. *Mut. Safety Ins. Co.* v. *Hone*, 2 N. Y. 235.

ARTICLE VII.

THE RISK, ITS DURATION AND EXTENT.

Section 1. In general. In ordinary cases, the risk insured against is uncertain as to the time when it may occur, as well as in reference to its occurring at all. The insurance of a crop against failure, for instance, would have reference to the time of harvest, a fixed event, while in ordinary fire and life insurance, there is no time to which the risk can particularly be referred. In marine insurance, the insurance may be for a particular voyage. In accident insurance, for a certain journey. In most cases then, it is an essential part of the contract that there shall be some certain period limited, during which the loss must occur in order to be covered by the contract. *Strohn* v. *Hartford Ins. Co.*, 37 Wis. 625; 19 Am. Rep. 777. This period may either be definitely stated in the contract, or its term may be fixed by reference to external matters. This term may relate back or not begin till a future date. The ordinary presumption, in the absence of any express provision, is that it begins at the date of the policy, although the policy may be actually delivered after the date. *Lightbody* v. *N. A. Ins. Co.*, 23 Wend. (N. Y.) 18. If there is a provision that it shall not take effect till a premium is paid or some other condition is complied with, when the requirement is performed or waived, the risk relates back to the date. *Ruse* v. *Mutual Benefit Ins. Co.*, 23 N. Y. (9 Smith) 516;

Whitaker v. *Farmers' Union Ins. Co.*, 29 Barb. (N. Y.) 312; *Hubbard* v. *Hartford Ins. Co.*, 33 Iowa, 325; 11 Am. Rep. 125; *Hallock* v. *Com. Ins. Co.*, 26 N. J. 268; S. C., 27 id. 645; *Walker* v. *Metropolitan Ins. Co.*, 56 Me. 371. And this, even though a loss intervenes. *Lightbody* v. *N. A. Ins. Co.*, 23 Wend. (N. Y.) 18; *Davenport* v. *Peoria Ins. Co.*, 17 Iowa, 276; *Baldwin* v. *Chouteau Ins. Co.*, 56 Mo. 151; 17 Am. Rep. 671; *Com. Ins. Co.* v. *Hallock*, 27 N. J. 645. If the time when it shall take effect is fixed by agreement, a previous delivery does not hasten its beginning. *Am. Horse Ins. Co.* v. *Patterson*, 28 Ind. 17; *Western* v. *Genesee Ins. Co.*, 12 N. Y. 258. As where it was not to take effect till a previous policy was surrendered. *Atlantic Ins. Co.* v. *Goodall*, 35 N. H. 328. Where the policy runs from one day to another, it would, unless circumstances controlled it, exclude the first day and include the second. *Isaacs* v. *Royal Ins. Co.*, 5 L. R. Ex. 296. Where no day was fixed for the beginning of the risk, but the policy was one of reinsurance, it was held to cover the same time as the original policy, though that had taken effect some months before. *Philadelphia Ins. Co.* v. *American Ins. Co.*, 23 Penn. St. 65. Where the policy is not to attach, if the subject insured was dead "at the time of insurance," the time of insurance means the commencement of the risk which may be long before the date or delivery of the policy. *American Ins. Co.* v. *Patterson*, 28 Ind. 17; *Kentucky Ins. Co.* v. *Jenks*, 5 id. 96. Where policies run for a fixed term, it may often be necessary to determine the day when they commence, in order to fix the day when they expire. It is usual to avoid these questions by fixing in the policy the day and hour on which the risk shall begin and end. A policy from August 1st, 1854, to August 1st, 1854, which should have been to Aug. 1st, 1859, was shown by a reference to the indorsement made by the insurers on the policy, to the application, and to the amount of the premium and deposit note, to be an insurance for five years from the 1st of Aug. 1854. *Liberty Hall Ass.* v. *Housatonic Ins. Co.*, 7 Gray (Mass.), 261.

§ 2. **What risks are covered by the policy.** After the risk once attaches, it covers, for the term stated, unless suspended, all loss by fire, death, accident, or whatever cause of loss or injury be provided against, however occasioned, unless there is some specific provision to the contrary. As we have before seen, it is seldom that a policy does not contain some limitations. These are usually intended to exclude from the risk all losses occasioned by the act of the insured, and all losses which by their circumstances are tainted with suspicion of secret fraud. There are some questions which have arisen upon the meaning of the

general term. It has been a question what would constitute an injury by fire. Where the damage is done in the intentional application of heat for some other purpose, which by accident or negligence does injury, it is not within the policy. *Austin* v. *Drewe*, 6 Taunt. 436; *Scripture* v. *Lowell*, 10 Cush. (Mass.) 356. But in many circumstances a loss by scorching paint, cracking glass and blistering pictures and furniture, or heating and destroying other articles, may be proper loss when caused by heat or fire which, if carried farther, would cause their destruction, which would be a loss covered. Id. In other words, the liability does not depend on the nature of the injury done, but upon its cause. Where the policy did not cover a fire originating in the building insured, a fire caused by the heat of another fire penetrating through the wall, is not within the exception. *Sohier* v. *Norwich Ins. Co.*, 11 Allen (Mass.), 336. Fire caused by a mob is not caused by "usurped power." *Drinkwater* v. *London Ass. Co.*, 2 Wils. 363. Nor is a destruction by municipal authority to stay the spread of a conflagration caused by "usurped power," though done illegally. *City Ins. Co.* v. *Corlies*, 21 Wend. (N. Y.) 367; *Pentz* v. *Ætna Ins. Co.*, 9 Paige's Ch. (N. Y.) 568. A fire set by lawful orders of military authority is not caused "by mobs or riots." *Harris* v. *York Ins. Co.*, 50 Penn. St. 341; *Boon* v. *Ætna Ins. Co.*, 40 Conn. 575. Loss caused by invasion includes buildings burned by soldiers, even if done without orders. *Barton* v. *Home Ins. Co.*, 42 Mo. 156. If the insurer be liable for loss occasioned by riot, the fact need not be established by a prosecution, not is it material that the mob was originally lawfully gathered. *Dupin* v. *Mutual Ins Co.*, 5 La. Ann. 482. Damages from efforts to save the property from fire, as by water, and breakage by removal, and by loss or theft consequent upon exposure occasioned by the fire, are within the risk covered by a fire-policy. *Whitehurst* v. *Fayetteville Ins. Co.*, 6 Jones (N. C.), 352; *Stanley* v. *Western Ins. Co.*, 3 L. R. Exch. 71; *Lewis* v. *Springfield Ins. Co.*, 10 Gray (Mass.), 159; *Tilton* v. *Hamilton Ins. Co.*, 1 Bosw. (N. Y.) 367; *Independent Ins. Co.* v. *Agnew*, 34 Penn. St. 96; *Witherell* v. *Maine Ins. Co.*, 49 Me. 200; *Talamon* v. *Home Ins. Co.*, 16 La. Ann. 426. It must appear that the loss resulted from the fire, and if this is established, it is immaterial whether it was at the time of the fire or afterward. *Newmark* v. *London & L. Ins. Co.*, 30 Mo. 160. But loss from either of these causes may be expressly excluded. *Fernandez* v. *Merchants' Ins. Co.*, 17 La. Ann. 131; *Webb* v. *Prot. Ins. Co.*, 14 Mo. 3. Where the loss was in consequence of removal, it must appear that the removal was reasonably necessary. *Hillier* v. *Alleghany County Ins. Co.*, 3 Penn. St. 470; *Case* v. *Hartford Ins. Co.*, 13 Ill. 676; *Brady* v. *N. W. Ins. Co.*, 11 Mich. 425.

Goods kept for illegal sale are covered. *Niagara Ins. Co.* v. *DeGraff*, 12 Mich. 124. A loss by fire resulting from lightning is covered, but not the injury caused by its direct destruction of the property. Loss by lightning is a different risk. *Babcock* v. *Montgomery County Ins. Co.*, 6 Barb. (N. Y.) 637; S. C., 4 N. Y. 326; *Kenniston* v. *Merrimack County Ins. Co.*, 14 N. H. 341; *Andrews* v. *Union Ins. Co.*, 37 Me. 356. Mere carelessness or negligence, however great, of the insured or his tenants or servants, is no defense, unless it amounts to fraud, or legal misconduct. *Citizens' Ins. Co.* v. *Marsh*, 41 Penn. St. 387; *Cumberland Valley Ins. Co.* v. *Douglas*, 58 Penn. St. 419; *Shaw* v. *Roberds*, 6 Ad. & El. 75; *Columbian Ins. Co.* v. *Lawrence*, 10 Pet. (U. S.) 507; *Gates* v. *Madison County Ins. Co.*, 5 N. Y. 469; *Williams* v. *N. E. Ins. Co.*, 31 Me. 219; *Johnson* v. *Berkshire Ins. Co.*, 4 Allen (Mass.), 388; *Mueller* v. *Putnam Ins. Co.*, 45 Mo. 84; *Mickey* v. *Burlington Ins. Co.*, 35 Iowa, 174; 14 Am. Rep. 494; *Lycoming Ins. Co.* v. *Barringer*, 73 Ill. 230. Misconduct is defined to be the transgression of some established and definite rule of action, where no discretion is left, as distinguished from carelessness and unskillfulness, which are the transgression of indefinite rules which give room for discretion. *Citizens' Ins. Co.* v. *Marsh*, 41 Penn. St. 387. Thus, the using forbidden means of increasing the furnace fires on a racing steamboat, or neglecting to apply water when at hand, to control a small fire, would be instances of misconduct. (Id.; *Chandler* v. *Worcester Ins. Co.*, 3 Cush. [Mass.] 328); but negligence, in matters which the policy expressly guards against, is fatal, as the resulting loss is excluded from the risk. *Worcester* v. *Worcester Ins. Co.*, 9 Gray (Mass.), 27. As the loss is not within the risk, it is immaterial that the fire originated without fault on the part of the insured. Id. Willful exposure is something more than negligence. *Providence Ins. Co.* v. *Martin*, 32 Md. 310. But gross negligence may be evidence of fraud, or bad faith, which always avoids the policy, as no one can be allowed to profit by his own turpitude. *Henderson* v. *Western Ins. Co.*, 10 Robt. (La.) 164; *Huckins* v. *People's Ins. Co.*, 31 N. H. 238; *Robinson* v. *Mercer County Ins. Co.*, 27 N. J. 134. Where losses by gross negligence or design are excepted, gross negligence means a want of even slight diligence (*Campbell* v. *Monmouth Ins. Co.*, 69 Me. 530); but it is not design, which imports intention. *Catlin* v. *Springfield Ins. Co.*, 1 Sumn. (C. C.) 434; *Gove* v. *Farmers' Ins. Co.*, 48 N. H. 41; 2 Am. Rep. 168. Where loss is not the direct result of the fire, the issue is whether the fire was the proximate cause. Where the walls of a burned building fell the day after the fire, and crushed a neighboring building, the injury was covered by the insurance. *Johnston* v. *West of Scotland Ins. Co.*, 7 Sess. Cas. (S. C.) 52.

But, where a building fell, and afterward the ruins caught fire, the fire was not the cause of the loss. *Nave* v. *Home Ins. Co.*, 37 Mo. 430. But, so far as the building or its contents were not destroyed by the fall, but were destroyed by the resulting fire, they are covered. *Lewis* v. *Springfield Ins. Co.*, 10 Gray (Mass.), 159. Fire by spontaneous combustion is within the risk. *Brit. Am. Ins. Co.* v. *Joseph*, 9 Low. Can. 448. So where a steamboat was burned in consequence of an explosion of gunpowder. *Waters* v. *Merchants' Ins. Co.*, 11 Pet. (U. S.) 213. Where the building was blown up to stop the fire, and afterward burned, the goods in it were covered. *City Ins. Co.* v. *Corlies*, 21 Wend. (N. Y.) 367. In *Scripture* v. *Lowell Ins. Co.*, 10 Cush. (Mass.) 356, damage by explosion caused by fire applied to gunpowder was held to be caused by the fire. But where the explosion is at a distance, and the injury is caused by the concussion which follows, it is not a damage by fire. *Everett* v. *London Ass. Co.*, 19 C. B. (N. S.) 126; *Caballero* v. *Home Ins. Co.*, 15 La. Ann. 217. Loss by the explosion of a steam boiler is not a loss by fire. *Millaudon* v. *Orleans Ins. Co.*, 4 La. Ann. 15. If fire resulted from such explosion, the damage, so far as caused by that alone, would be covered. *Briggs* v. *N. A. Ins. Co.*, 53 N. Y. 446; 66 Barb. 325. But where a loss, occasioned by the explosion of a steam boiler, is excepted from the risk, a loss by resulting fire is not covered. *St. John* v. *Am. Ins. Co.*, 1 Duer (N. Y.), 371; S. C., 11 N. Y. (1 Kern.) 516; *Hayward* v. *Liverpool & L. Ins. Co.*, 7 Bosw. (N. Y.) 385. And this, even if the explosion and original fire were in some other building. *Mutual Ins. Co.* v. *Tweed*, 7 Wall. (U. S.) 44. But the law was held differently in *Commercial Ins. Co.* v. *Robinson*, 64 Ill. 265; 11 Am. Rep. 557; where the fire was caused by gas which came in contact with a light and caused an explosion and following conflagration, the loss was not covered by a policy which excepted loss resulting from an explosion. *United Ins. Co.* v. *Foote*, 22 Ohio St. 340; 10 Am. Rep. 735; *Stanley* v. *Western Ins. Co.*, L. R., 3 Exch. 71. Where a vessel being injured by a collision, took fire in consequence, burned and sank, the liability on a fire policy depends on the question whether the sinking was caused by the collision alone, or by the fire. *Norwich Transp. Co.* v. *West Mass. Ins. Co.*, 34 Conn. 561; *Howard Ins. Co.* v. *Norwich Ins. Co.*, 12 Wall (U. S.) 194. Where the excepted cause, as explosion or collision, substantially destroys the property, there can be no recovery for a subsequent event like the burning or sinking of the ship. *Evans* v. *Columbian Ins. Co.*, 44 N. Y. (5 Hand) 146; 4 Am. Rep. 650; *Nave* v. *Home Ins. Co.*, 37 Mo. 430. If the controversy is as to what goods are included in the description in the policy, the presumptions are against the insurers. *Frank-*

lin Ins. Co. v. *Updegraff*, 43 Penn. St. 350; *Clarke* v. *Firemen's Ins. Co.*, 18 La. (O. S.) 431. Wearing apparel, furniture and stock of a grocery does not include linen and sheets intended for sale. Nor an article like a watch which the policy requires should be particularly set out. *Clary* v. *Prot. Ins. Co.*, 1 Wright (Ohio), 228; *Watchorn* v. *Langford*, 3 Camp. 422. Stock in trade in mechanical pursuits include fixtures and implements. *Moadinger* v. *Mech. Ins. Co.*, 2 Hall (N. Y.), 490. Furniture and moveables do not include fixtures (*Holmes* v. *Charlestown Ins. Co.*, 10 Metc. [Mass.] 211); nor does jewelry, as a stock in trade, include musical instruments, guns or books (*Rafel* v. *Nashville Ins. Co.*, 7 La. Ann. 244); nor does merchandise include articles kept wholly or in part for use (*Kent* v. *Liverpool Ins. Co.*, 26 Ind. 294; *Burgess* v. *Alliance Ins. Co.*, 10 Allen [Mass.], 221); nor an unfurnished house, materials prepared for it, but left in an adjoining house (*Ellmaker* v. *Franklin Ins. Co.*, 5 Penn. St. 183); nor a vessel, materials for her, if left about the yard. *Mason* v. *Franklin Ins. Co.*, 12 G. & J. (Md.) 468; *Hood* v. *Manhattan Ins. Co.*, 11 N. Y. 532. "Stock of watches, watch trimmings," etc., include plate, silver plate, tools and other articles which usually form part of similar stock (*Crosby* v. *Franklin Ins. Co.*, 5 Gray [Mass.], 504); and "house or building" every thing appurtenant to or connected with the main building (*Workman* v. *La. Ins. Co.*, 2 La. [O. S.] 507; *Blake* v. *Exchange Ins. Co.*, 12 Gray [Mass.], 265; *White* v. *Mut. Ass. Co.*, 8 Gray [Mass.], 566); and ship-yard, all places used as part of it (*Webb* v. *Nat. Ins. Co.*, 2 Sandf. [N. Y.] 497); and stock yard of lumber, pieces partly prepared to put into the vessel, (id.) and steam starch manufactory, necessary machinery (*Bigler* v. *N. Y. Central Ins. Co.*, 20 Barb. [N. Y.] 635; *Peoria Ins. Co.* v. *Lewis*, 18 Ill. 553); raw stock is included under stock manufactured and in process. *Spratley* v. *Hartford Ins. Co.*, 1 Dill. (C. C.) 392. Merchandise, "such as is usually kept in country stores" includes all goods usually so kept, though belonging to classes which the policy requires to be specially insured (*Franklin Ins. Co.* v. *Updegraff*, 43 Penn. St. 350); but not where there is a special condition against them. *Birmingham Ins. Co.* v. *Kroegher*, 83 Penn. St. 64. It is a question of fact whether a certain article is included under the word "groceries." A wagon-maker's shop includes articles commonly used in the business, although their use is prohibited by the printed part of the policy. *Archer* v. *Merchants' Ins. Co.*, 43 Mo. 434. That the article is kept for illegal sale does not deprive it of protection. *Niagara Ins. Co.* v. *DeGraff*, 12 Mich. 124. Insurance on merchandise covers their own or that held by them in trust, or in which they have an interest, or liability,

and covers the goods and not the insurer's interest only. *Home Ins. Co.* v. *Baltimore Warehouse Co.*, 93 U. S. 527. Goods "held in trust" are goods with which the insured is intrusted, and the words do not imply any technical trust (*Hough* v. *People's Ins. Co.*, 36 Md. 398; *Home Ins. Co.* v. *Baltimore Warehouse Co.*, 93 U. S. 527); they cover every thing in which the insured has a qualified interest by possession while the ownership is in another. *Turner* v. *Stetts*, 28 Ala. 420. Thus, cloth in the possession of the insured is covered by these words (*Stillwell* v. *Staples*, 19 N. Y. [5 Smith] 401); or goods on which he had made advances, he having represented the security of these as his object. *Parks* v. *Gen. Ass. Co.*, 5 Pick. (Mass.) 34. An insurance on "all the articles making up the stock of a porkhouse" covers every thing belonging to the stock without regard to individual ownership. *Ætna Ins. Co.* v. *Jackson*, 16 B Monr. (Ky.) 250. On freight cars owned or used by the company covers cars of other roads in their possession. *Com.* v. *Hide and Leather Ins. Co.*, 112 Mass. 136; 17 Am. Rep. 72. Blankets used to protect a store from fire are not covered by an insurance on the stock. *Welles* v. *Boston Ins. Co.*, 6 Pick. (Mass.) 182. On logs piled along the line, does not cover those belonging to others though the railroad may be liable for burning them. *Monadnock Railroad* v. *Man. Ins. Co.*, 113 Mass. 77. Where the place in which the goods are insured is limited, they are not covered in other places. *Annapolis Railroad* v. *Baltimore Ins. Co.*, 32 Md. 37; 3 Am. Rep. 1112. As a rule the fact that they are described as in a certain building is enough. *Severance* v. *Continental Ins. Co.*, 5 Biss. (U. S.) 156; *Maryland Ins. Co.* v. *Gusdorf*, 43 Md. 506; *Hartford Ins. Co.* v. *Farrish*, 73 Ill. 166. But this may depend on the nature of the article and the apparent intention.

§ 4. **Termination of risk.** The risk may be terminated either by the expiration of the term for which the insurance was effected, by a voluntary abandonment of the contract, by mutual consent, by a cancellation by the insurer, or, a surrender by the insured; in either case, under some power reserved in the contract; by a breach of some condition by the insured of which the insurer takes advantage, or by the happening of the contingency insured against. Where the policy expires in its regular course, it is only a question of interpretation. If it is a time policy, its expiration is fixed by its beginning, which we have already discussed, or the exact time of its termination may be stated in the policy. If it is intended to cover a particular risk, it expires when the risk ceases. Thus, an insurance for a voyage, or a journey, would terminate when the voyage, or the journey, terminated. Where the contract is once entered into and has become bind-

ing, it cannot be canceled by either without the consent of the other. The agreement to abrogate must be perfected by a mutual assent to it. *Alliance Ins. Co.* v. *Swift*, 10 Cush. (Mass.) 433; *Sands* v. *Hill*, 42 Barb. (N. Y.) 651; *Fabyan* v. *Union Ins. Co.*, 33 N. H. 203. The agreement may be by parol. Where the right to cancel is reserved to the insurer, and he attempts to exercise it against the will of the insured, he must bring himself strictly within the terms of the right reserved. A mere notice of a desire to cancel, with an agreement that the policy may remain till other insurance is got, is not enough. *Goit* v. *Nat. Prot. Ins. Co.*, 25 Barb. (N. Y.) 189. If the contract is terminable on a refusal to pay an assessment on demand, the assessment must be a valid one. *In re People's Ins. Co.*, 9 Allen (Mass.), 319. If the notice is given a longer time before loss than the contract requires, the insurers are not liable, and it is immaterial, that an earlier date is stated in the notice, than the facts required. *Emmott* v. *Slater Ins. Co.*, 7 R. I. 562. A temporary contract made by an agent giving protection subject to the approval of the insurer, is terminated when the insured receives notice of their disapproval. *Goodfellow* v. *Times Ass. Co.*, 17 Up. Can. 411. And the neglect of the agent to give such notice continues the contract. *Franklin Ins. Co.* v. *Massey*, 33 Penn. St. 221. Where the right to cancel is upon notice and payment of return premium, the policy does not terminate till the return premium is paid, or tendered. *Van Valkenburgh* v. *Lenox Ins. Co.*, 51 N. Y. (6 Sick.) 465; *Lyman* v. *State Ins. Co.*, 14 Allen (Mass.), 329; *Home Ins. Co.* v. *Curtis*, 32 Mich. 402. Where the notice was required to be served on the defendant personally, but was sent by mail, it is good if actually received by him without objection. *Hollister* v. *Quincy Ins. Co.*, 118 Mass. 478; *Plath* v. *Farmers' Ins. Co.*, 23 Minn. 479. A surrender is governed by the same rules as a cancellation. If the policy is set up by one who has attempted to surrender it, it would require less evidence than if he set up a surrender as a defense to an assessment or premium note. In case of a claim that the insurance has been forfeited by breach of some condition, it will depend on its terms whether the policy becomes void at once, or the company must avoid it by some act on their part. In the case of all warranties or conditions, the non-performance of which lies within the knowledge of the insured, the rule would not require any action by the insurers till the breach came to their knowledge. If after that they treat the policy as binding, it is a waiver of the breach. *Finley* v. *Lycoming County Ins. Co.*, 30 Penn. St. 311; *Forbes* v. *Agawam Ins. Co.*, 9 Cush. (Mass.) 470; *Allen* v. *Vermont Ins. Co.*, 12 Vt. 366. The act may be explained as a mistake. Thus where under a vote to assess all

policies in force, the treasurer made out an assessment on a policy which had been forfeited, it did not revive the policy. *Diehl* v. *Adams County Ins. Co.*, 58 Penn. St. 443; *Beatty* v. *Lycoming County Ins. Co.*, 66 Penn. St. 9; 5 Am. Rep. 318. As a rule, a policy is terminated by a total loss. But in some mutual companies, while the company is no farther liable, the liability of the insured upon his premium note continues for the full original term. *Boot and Shoe Manuf's Ins. Co.* v. *Melrose Soc.*, 117 Mass. 199. In case of a partial loss, the sum at risk by the insurers is diminished by the amount which they pay, and the policy remains valid for the remainder. If the policy provides that so long as a forbidden use is made of the premises, or some other provision is violated, the policy shall cease, it will revive when such violation ceases. *Ins. Co. of N. A.* v. *McDowell*, 50 Ill. 120; *U. S. Ins. Co.* v. *Kimberly*, 34 Md. 224; 5 Am. Rep. 325; *Moore* v. *Protection Ins. Co.*, 29 Me. 97.

ARTICLE VIII.

LOSS AND ITS ADJUSTMENT.

Section 1. In general. The amount payable for a loss is the sum which will fairly remunerate the party insured. In cases where that sum cannot be ascertained by ordinary rules of computation, the parties usually agree upon some arbitrary sum. Thus, in life insurance, where the loss is total, the policy is valued, and the sum stated on it is final. Even here, where the interest, as in case of a creditor who insures his debtor's life, is a definite one, any great excess of insurance over the amount of the debt would be evidence of fraud, and tend to bring the policy within the class of wagering or gambling policies. *Mitchell* v. *Union Ins. Co.*, 45 Me. 104. And in case of double insurance there may be contribution. *Hebdon* v. *West*, 3 Best & Sm. 579. In case of fire, where the end is to indemnify the insured, all loss caused immediately by the fire is to be included in the estimate. *Underhill* v. *Agawam Ins. Co.*, 6 Cush. (Mass.) 440; *Peddie* v. *Quebec Ins. Co.*, 1 Stuart (L. C.), 174. Remote and consequential damages, such as the loss of custom to an inn (*Sun Ins. Co.* v. *Wright*, 1 Ad. & El. 621; S. C., 3 Nev. & Man. 819), or of the use and profits of a mill, or loss of services of operatives while rebuilding (*Mengies* v. *North British Ins. Co.*, 9 Ct. Sess. Cas. [Scotch] 694; *Niblo* v. *N. A. Ins. Co.*, 1 Sandf. [N. Y.] 551), or of prospective rent (*Leonarda* v. *Phœnix Ass. Co.*, 2 Rob. [La.] 131), cannot be recovered. But by special contract either of these losses might have been covered. The expense of re-

storing the lost property is not the standard. In marine insurance, one-third is allowed for the advantage of new for old, but in fire insurance, the jury must determine the whole question. *Brinley* v. *National Ins. Co.*, 11 Metc. (Mass.) 195. The loss payable in fire insurance has no reference to the relation of the amount of damage to the whole value, but is fixed absolutely by the injury. *Miss. Ins. Co.* v. *Ingram*, 34 Miss. 215; *Liscom* v. *Boston Ins. Co.*, 9 Metc. (Mass.) 205. The fact that the article to be replaced is patented does not alter the rule of calculation. *Commonwealth Ins. Co.* v. *Sennett*, 37 Penn. St. 205. Where the insurers reserve the right to rebuild, if they elect to do so the policy becomes a contract to rebuild, and they are liable for imperfect performance. *Morrell* v. *Irving Ins. Co.*, 33 N. Y. (6 Tiff.) 429; *Times Ins. Co.* v. *Hawke*, 5 H. & N. 935. This right to rebuild can only be gained by special contract, and then the insurer has the election to pay the loss, or to rebuild. *Wallace* v. *Ins. Co.*, 4 La. (O. S.) 289; *Com. Ins. Co.* v. *Sennett*, 37 Penn. St. 205. The election must be made within a reasonable time, which is for the jury, and in the mean time all right of action is suspended. *Haskins* v. *Hamilton Ins. Co.*, 5 Gray (Mass.), 432. An election within a month after the proofs were furnished was held reasonable, in *Sutherland* v. *Sun Ins. Co.*, 14 Ct. Sess. Cas. N. S. (Scotch) 775; *Ins. Co. of N. A.* v. *Hope*, 58 Ill. 75; 11 Am. Rep. 48. Where the insurers partially completed their repairs, they are to be allowed for the value of what they have done. *Parker* v. *Eagle Ins. Co.*, 9 Gray (Mass.), 152; *Morrell* v. *Irving Ins. Co.*, 33 N. Y. (6 Tiff.) 429. If the insurer undertakes to rebuild, but is refused permission to do so, or prevented by the public authorities, it is no defense to him, and if he has begun the work he must bear the loss. *Brown* v. *Royal Ins. Co.*, 1 E. & E. 853; *Brady* v. *North Western Ins. Co.*, 11 Mich. 425. After an election to rebuild, and while the work is going on, the right of action on the policy is suspended. *Beals* v. *Home Ins. Co.*, 36 Barb. (N. Y.) 614; S. C., 36 N. Y. (9 Tiff.) 522. If the insured refuses permission to rebuild, he loses his right of action. Id. But, where the insured, before an election, removed the goods so that the amount to be replaced could not be determined, or began himself to rebuild, it may be evidence against him, but it was held not to bar him of his remedy. *N. Y. Ins. Co.* v. *Delavan*, 8 Paige (N. Y.), 419. The acceptance of an order to pay the loss to some other person than the insured is not an election not to rebuild, and does not deprive the insurers of their right to do so. *Tolman* v. *Manufacturers' Ins. Co.*, 1 Cush. (Mass.) 73. If the insurance is for a specific amount, for a given period, the insurers may be obliged to repair more than

once, if there is a second loss. *Trull* v. *Roxbury Ins. Co.*, 3 Cush. (Mass.) 263.

Even after an election, the repairs must be completed in a reasonable time, or the insured may sue on the policy. *Haskins* v. *Hamilton Ins. Co.*, 5 Gray (Mass.), 432; *Home Ins. Co.* v. *Garfield*, 60 Ill. 124; 14 Am. Rep. 27. The insurance company are not liable for rent while they occupy the premises for the purpose of making repairs. *St. Paul's Ins. Co.* v. *Johnson*, 77 Ill. 598. Neither a mortgagee nor a judgment creditor who has a lien can control the action of the parties under this clause, even after the time provided for an election has expired. *Stamps* v. *Conn. Ins. Co.*, 77 N. C. 209.

The fact that the building destroyed was on leased land, and that the lease would have expired in a few days, so that the building must have been removed or forfeited, was held to be immaterial. *Laurent* v. *Chatham Ins. Co.*, 1 Hall (N. Y.), 41. And so that the interest of the insured had been seized on execution. *Strong* v. *Manufacturers' Ins. Co.*, 10 Pick. (Mass.) 40. So when the goods are in the custom house, that the duties are unpaid. *Wolfe* v. *Howard Ins. Co.*, 1 Sandf. (N. Y.) 124; S. C., 1 N. Y. 583; *Cory* v. *Boylston Ins. Co.*, 107 Mass. 140; 9 Am. Rep. 14. But where liquor, subject to the internal revenue tax, was destroyed, it was held that the real loss was the value less the tax. *Security Ins. Co.* v. *Farrell*, 2 Ins. L. J. 302. The question, in either case, would be the market value, and so long as the tax was a lien on the goods, it would be an element in the market value of all like goods. A special temporary depression may be disregarded. *McCraig* v. *Quaker City Ins. Co.*, 18 Up. Can. 130; *contra*, *Grant* v. *Ætna Ins. Co.*, 11 Low. Can. 128. Where a leasehold interest is insured, the length of the term unexpired is to be considered. *Niblo* v. *N. A. Ins. Co.*, 1 Sandf. (N. Y.) 551. A mortgagee recovers according to his interest at the time of loss, and it is immaterial that the property was afterward restored or improved. *Sussex County Ins. Co.* v. *Woodruff*, 26 N. J. 541; *Foster* v. *Equitable Ins. Co.*, 2 Gray (Mass.), 216; *Carpenter* v. *Washington Ins. Co.*, 16 Pet. (U. S.) 495. The mortgagee can ordinarily recover the full amount insured, as he is entitled to have the whole value of the mortgaged property kept good as his security. *State Mut. Fire Ins. Co.* v. *Updegraff*, 21 Penn. St. 513. So in case of a vendor after his insurance has been in part paid. If there is a surplus, it must be arranged between the vendor and the vendee, and the insurer cannot interfere. Id.; *Boston and Salem Ice Co.* v. *Royal Ins. Co.*, 12 Allen (Mass.), 381. The value of what is left as security for his debt is immaterial. *Kernochan* v. *N. Y. Bowery Ins. Co.*, 5 Duer (N. Y.), 1; S. C., 17

N. Y. (3 Smith) 428. A merchant or warehouseman who insures goods, his own as well as others, on commission or in trust, recovers the full value. *DeForest* v. *Fulton Ins. Co.*, 1 Hall (N. Y.), 84; *Lee* v. *Howard Ins. Co.*, 11 Cush. (Mass.) 324; *Brichta* v. *N. Y. Lafayette Ins. Co.*, 2 Hall (N. Y.), 372; *Waters* v. *Monarch Ins. Co.*, 5 E. & B. 870; *Hough* v. *People's Ins. Co.*, 36 Md. 398; *London Railway Co.* v. *Glyn*, 1 E. & E. 652; *Siter* v. *Morrs*, 13 Penn. St. 218; *Home Ins. Co.* v. *Baltimore Warehouse Co.*, 93 U. S. 527. Any balance above the claim which the consignee has upon the goods, he holds as trustee for the general owner. *Hough* v. *People's Ins. Co.*, 36 Md. 398. So an insurance of goods "sold but not removed," covers goods of which there has been a delivery, and the title has passed. *Waring* v. *Indemnity Ins. Co.*, 45 N. Y. (6 Hand) 606; 6 Am. Rep. 146. Where a partnership is dissolved by death, the policy does not cover goods added to the stock by the surviving partner, who continues the business. *Wood* v. *Rutland Ins. Co.*, 31 Vt. 552. The loss might be limited to a certain percentage of the value. Where the insured was not to claim over three-fourths of the actual loss, provided it did not amount to over three-fourths of the sum insured, he can recover the whole in case of a total loss. *Farmers' Ins. Co.* v. *Graybill*, 74 Penn. St. 17. If the value is fixed in the policy, the amount payable is also fixed. *Phillips* v. *Merrimack Ins. Co.*, 10 Cush. (Mass.) 350. If the loss is restricted to a certain portion of the value at the time of loss, that value will be open to nquiry. *Post* v. *Hampshire Ins. Co.*, 12 Metc. (Mass.) 555; *Huckins* v. *People's Ins. Co.*, 31 N. H. 238; *Egan* v. *Mut. Ins. Co.*, 5 Den. (N. Y.) 326; *Ashland Ins. Co.* v. *Housinger*, 10 Ohio St. 10. Where two-thirds of a total loss was to be paid and partial losses in full, the insured cannot in any event recover over two-thirds although a partial loss may exceed that amount. *Singleton* v. *Broome County Ins. Co.*, 45 Mo. 250. An overvaluation without fraud is no defense. *Williams* v. *N. E. Ins. Co.*, 31 Me. 219; *Cumberland Valley Ins. Co.* v. *Schell*, 29 Penn. St. 31. Where there is a provision for apportionment, between the insurer and the insured, of expenses of removal and protection during a fire, the proportion will be according to the interest of each. *Welles* v. *Boston Ins. Co.*, 6 Pick. (Mass.) 182. Where goods in several buildings are insured in a gross sum, the whole amount may be recovered for a loss on either. *Com.* v. *Hide and Leather Ins. Co.*, 112 Mass. 136; 17 Am. Rep. 72; *Nicolet* v. *Ins. Co.*, 3 La. 366; *Rix* v. *Mutual Ins. Co.*, 20 N. H. 198. If there are several policies, by different insurers, to an amount more than the loss, each is liable for its proportion. But, in the absence of any provision for proportional liability, the insured may collect his loss of

either and then the matter must be adjusted by contribution between the insurers. *Merrick* v. *Germania Ins. Co.*, 54 Penn. St. 277; *Baltimore Ins. Co.* v. *Loney*, 20 Md. 20; *Peoria Ins. Co.* v. *Lewis*, 18 Ill. 553; *Mechanics' Ins. Co.* v. *Nichols*, 16 N. J. 410; *Lucas* v. *Jefferson Ins. Co.*, 6 Cow. (N. Y.) 635; *Godin* v. *London Ass. Co.*, 1 Burr, 492. If there is a clause for proportional liability, that fixes the loss for which the insurer is liable, and there is no contribution for any payment beyond that sum, but it must be recovered back from the insured. *Lucas* v. *Jefferson Ins. Co.*, 6 Cow. (N. Y.) 635; *Fitzsimmons* v. *City Ins. Co.*, 18 Wis. 234. Where there is a provision for proportional liability, but the policies cover in part different goods, the sum insured is to be distributed among the different lots in proportion to their value, and then the liability should be apportioned on the goods twice insured on that basis. *Ogden* v. *East River Ins. Co.*, 50 N. Y. (5 Sick.) 388; 10 Am. Rep. 492; *Blake* v. *Exchange Ins. Co.*, 12 Gray (Mass.), 265; *Cromie* v. *Kentucky Ins. Co.*, 15 B. Monr. (Ky.) 432; *Angelrodt* v. *Delaware Ins. Co.*, 31 Mo. 593. An individual policy on firm property, which has been treated as insurance for the firm, shares in the apportionment. *Liverpool Ins. Co.* v. *Verdier*, 33 Mich. 138. The apportionment is to be on the basis of the actual insurances, not on that of the insurance stated in the policy to be contemplated. *Richmondville Sem.* v. *Hamilton Ins. Co.*, 14 Gray (Mass.), 459. Where the policy was a general or floating one, it may provide that if any of the goods are protected by specific insurance, the floating policy shall only be chargeable with the remainder of their value. *Fairchild* v. *Liverpool Ins. Co.*, 51 N. Y. (6 Sick.) 65. The fact that the policy was taken out on the same day with the deposit of the goods, and for goods of the same description, was held evidence that it was specific. *Hough* v. *People's Ins. Co.*, 36 Md. 398. Such policies being payable to the warehousemen were on the same risk as a general floating policy procured by them and constituted double insurance. But policies taken by different mortgagees are on different interests and are not subject to apportionment. *Fox* v. *Phœnix Ins. Co.*, 52 Me. 333. Where the liability is limited to two-thirds the value and is subject to apportionment, the estimate is made on the proportion which the whole insurance bears to the two-thirds. *Goodall* v. *N. E. Ins. Co.*, 25 N. H. 169; *Haley* v. *Dorchester Ins. Co.*, 12 Gray (Mass.), 545. In case of a provision for apportionment on an insurance policy, it applies only to other reinsurance. *Mutual Safety Ins. Co.* v. *Hone*, 2 N. Y. 235. If the other insurance is void, the provision does not apply. *Hygum*

v. *Ætna Ins. Co.*, 11 Iowa, 21; *Forbush* v. *Western Ins. Co.*, 4 Gray (Mass.), 337.

§ 2. **Notice; proofs and payment.** In cases of loss the insurer is entitled to demand notice of the loss, proof of the facts, and an opportunity to investigate them before he is obliged to pay. *O'Reilly* v. *Guardian Ins. Co.*, 60 N. Y. (15 Sick.) 169; 19 Am. Rep. 151. The nature of the notice and proof is almost universally fixed by the policy, and is sometimes defined by statute. No loss is payable until these provisions are complied with, unless they are waived. *Mix* v. *Andes Ins. Co.*, 9 Hun (N. Y.), 397. It need not be in writing, unless the contract requires it. *Killips* v. *Putnam Ins. Co.*, 28 Wis. 472; 9 Am. Rep. 506. In such case it is enough that the officers of the insurance company actually inspect the premises. Any farther notice would be futile. *Owen* v. *Farmers' Ins. Co.*, 57 Barb. (N. Y.) 518; *Roumage* v. *Mechanics' Ins. Co.*, 13 N. J. 110. The form is immaterial, if it conveys the necessary information. *Rix* v. *Mut. Ins. Co.*, 20 N. H. 198; *Barker* v. *Phœnix Ins. Co.*, 8 Johns. (N. Y.) 307. It must be given within the time required in the contract. *Davis* v. *Davis*, 49 Me. 282. The words "forthwith," "as soon as possible," or "immediately," call for ordinary diligence, without unnecessary or unreasonable delay, and this is ordinarily a question for the jury. *Kingsley* v. *N. E. Ins. Co.*, 8 Cush. (Mass.) 393; *Peoria Ins. Co.* v. *Lewis*, 18 Ill. 553; *Edwards* v. *Baltimore Ins. Co.*, 3 Gill (Md.), 176; *Prov. Ins. Co.* v. *Baum*, 29 Ind. 236; *Phillips* v. *Protective Ins. Co.*, 14 Mo. 220. Where the case has been decided by the court, eight days was not considered unreasonable. *N. Y. Central Ins. Co.* v. *Nat. Prot. Ins. Co.*, 20 Barb. (N. Y.) 468; *Schenck* v. *Mercer County Ins. Co.*, 24 N. J. 447; *West Branch Ins. Co.* v. *Helfenstein*, 40 Penn. St. 289. But five months (*Sherwood* v. *Agricultural Ins. Co.*, 17 N. Y. Sup. [10 Hun] 593); four months (*McEvers* v. *Lawrence*, 1 Hoff. Ch. [N. Y.] 172); thirty-eight days (*Inman* v. *Western Ins. Co.*, 12 Wend. [N. Y.] 452); twenty days (*Whitehurst* v. *N. C. Ins. Co.*, 7 Jones' L. [N. C.] 433); or even eleven days' delay (*Trask* v. *State Ins. Co.*, 29 Penn. St 198), has been held to be a breach of this requirement, unless there was some excuse. Under other circumstances, thirty-one days' delay (*Jones* v. *Mechanics' Ins. Co.*, 36 N. J. 29; 13 Am. Rep. 405); twenty-five days (*Bennett* v. *Lycoming Ins. Co.*, 67 N. Y. 274); or nineteen days (*Wightman* v. *Western Ins. Co.*, 8 Rob. [La.] 442); or thirty-four days (*Knickerbocker Ins. Co.* v. *Gould*, 80 Ill. 388), did not bar the insured. But the insurers may waive their right to a compliance with this clause. *Eastern Railroad* v. *Relief Ins. Co.*, 105 Mass. 570.

Thus an absolute refusal to pay on other grounds is a waiver. *Lycoming Ins. Co.* v. *Dunmore*, 75 Ill. 14. Going to trial on other consistent defenses is not a waiver. *Farmers' Ins. Co.* v. *Frick*, 29 Ohio St. 466. They may be estopped to use this defense. Thus, where they had wrongfully refused to issue a policy, even eleven months' delay did not prevent a recovery. *Tayloe* v. *Merchants' Ins. Co.*, 9 How. (U. S.) 390. So where the secretary prevented the preparation of the proofs. *State Ins. Co.* v. *Todd*, 83 Penn. St. 272; *Cornell* v. *Leroy*, 9 Wend. (N. Y.) 163; *Underwood* v. *Farmers' Ins. Co.*, 57 N. Y. 500. So if they take part in preparing them, and the delay is without objection. *Jones* v. *Mechanics' Ins. Co.*, 36 N. J. 29; 13 Am. Rep. 405. The assured is the proper person to give the notice. But a notice by another person at his request, although not so stated on its face, may be enough, if the insured ratifies and acts upon it. *Stimpson* v. *Monmouth Ins. Co.*, 47 Me. 379. Where the insurance was procured by an agent who had exclusive charge of the property, he may make the proofs. *Sims* v. *State Ins. Co.*, 47 Mo. 54; 4 Am. Rep. 311. Even an attaching creditor has been allowed to make them. *N. W. Ins. Co.* v. *Atkins*, 3 Bush (Ky.), 328. So, a mortgagee to whom the policy is payable (*Pratt* v. *N. Y. Central Ins. Co.*, 64 Barb. [N.Y.] 589; S. C., 55 N. Y. [10 Sick.] 505; 14 Am. Rep. 304); or the personal representatives of the insured after his death. *Farmers' Ins. Co.* v. *Graybill*, 74 Penn. St. 17. If the policy has been assigned with the consent of the insurer, the assignee may give the notice. *Cornell* v. *Leroy*, 9 Wend. (N. Y.) 163. A notice by the agent of the insurers on information received by him from the insured is enough. *West Branch Ins. Co.* v. *Helfenstein*, 40 Penn. St. 289. If the policy names the person to whom the notice is to be given, it must be given to or proved to have reached that person. *Patrick* v. *Farmers' Ins. Co.*, 43 N. H. 621; *Inland Ins. Co.* v. *Stauffer*, 33 Penn. St. 397. A director is not an authorized officer. Id. Where the notice is to be given to some known agent, it may be given to the local agent who effected the insurance, the insured not knowing that his authority had terminated. *Marsden* v. *City Ins. Co.*, L. R., 1 C. P. 232. Putting the notice in the post-office is not enough, unless it reaches the insurers. *Hodgkins* v. *Montgomery County Ins. Co.*, 34 Barb. (N. Y.) 213. A waiver of these requirements will be inferred from any conduct inconsistent with an intention to insist upon them. Thus a payment of part is a waiver of every thing necessary on the part of the insured to a recovery of that part. *Westlake* v. *St. Lawrence Ins. Co.*, 14 Barb. (N. Y.) 206. A vote to indefinitely postpone the payment of a loss is not a waiver of notice within thirty days. *Patrick* v. *Farmers' Ins. Co.*, 43 N. H.

621. A denial of the contract is a waiver of proofs (*Taylor* v. *Merchants' Ins. Co.*, 9 How. [U. S.] 390; *Post* v. *Ætna Ins. Co.*, 43 Barb. [N. Y.] 351; *N. E. Ins. Co.* v. *Robinson*, 25 Ind. 536); or a denial of liability to the person claiming payment (*Rogers* v. *Traders' Ins. Co.*, 6 Paige's Ch. [N. Y.] 583; *Franklin Ins. Co.* v. *Coates*, 14 Md. 285); or a refusal to pay on other grounds. *Priest* v. *Ins. Co.*, 4 Phila. 8; *Priest* v. *Citizens' Ins. Co.*, 3 Allen (Mass.), 602; *Lewis* v. *Monmouth Ins. Co.*, 52 Me. 492; *Noyes* v. *Washington Ins. Co.*, 30 Vt. 659; *La Societe* v. *Morris*, 24 La. Ann. 347; *McBride* v. *Republic Ins. Co.*, 30 Wis. 562; *Lycoming Ins. Co.* v. *Dunmore*, 75 Ill. 14. Such as that the policy has been forfeited for non-payment of assessments (*Blake* v. *Exchange Ins. Co.*, 12 Gray [Mass.], 265; *Hartford Ins. Co* v. *Harmer*, 2 Ohio St. 452); or that the property destroyed was not within the policy (*Franklin Ins. Co.* v. *Coates*, 14 Md. 285); or that the insured has forfeited his right by fraud. *Peoria Ins. Co.* v. *Whitehill*, 25 Ill. 466. It is not a waiver to go to trial on other consistent grounds. *Farmers' Ins. Co.* v. *Frick*, 29 Ohio St. 466. If the defect is one which the insured can cure, the insurers must call his attention to it, that he may correct it. But if it is a defect which cannot be cured, there is no demand of good faith to object to it. *Patrick* v. *Farmers' Ins. Co.*, 43 N. H. 621; *St. Louis Ins. Co.* v. *Kyle*, 11 Mo. 278. Defects cannot be first insisted on at the trial. *Bilbrough* v. *Metropolitan Ins. Co.*, 6 Duer (N. Y.), 587; *Fireman's Ins. Co.* v. *Crandall*, 33 Ala. 9; *contra*, *Scott* v. *Phœnix Ins. Co.*, 1 Stuart (Can.), 354. Insanity in the insured was held an excuse for delay. *Germania Ins. Co.* v. *Boykin*, 12 Wall. (U. S.) 433. Inability to furnish the proofs on account of a loss of the policy is held to be no excuse. *Blakely* v. *Phœnix Ins. Co.*, 20 Wis. 205. The notice and proofs must convey substantially the information required by the contract. The requirements are construed strictly against the insurers. *Roper* v. *Lendon*, 1 E. & E. 825; *Commonwealth Ins. Co.* v. *Sennett*, 41 Penn. St. 161; *Great Western Ins. Co.* v. *Staaden*, 26 Ill. 360. The requirement must be in the contract, and not in any pamphlet or circular, although delivered with it. *Taylor* v. *Ætna Ins. Co.*, 13 Gray (Mass.), 434. The court are to decide what notice and proofs the policy requires, and the insurers cannot compel the insured to follow their forms. Id. Unless the policy calls for specific information, and sets out what the proofs shall be, they need only set out such evidence as ought to be satisfactory. *Mason* v. *Harvey*, 8 Exch. 819; *Walsh* v. *Washington Ins. Co.*, 32 N. Y. (5 Tiff.) 427. If the provision is for satisfactory proof, and such farther evidence as the insurer may think necessary, the insurer cannot unreasonably or capriciously require evidence. *Braunstein* v. *Accidental Death Ins. Co.*, 1

B. & S. 782. Where the production of the certificate as to the loss by some person or official named is required, it is no excuse that he capriciously refuses to give it. *Worsley* v. *Wood*, 6 T. R. 710; *Cornell* v. *Hope Ins. Co.*, 15 Mart. (La.) 223; *Roumage* v. *Mechanics' Ins. Co*, 13 N. J. 110; *Noonan* v. *Hartford Ins. Co.*, 21 Mo. 81; *Leadbetter* v. *Ætna Ins. Co.*, 13 Me. 265; *Johnson* v. *Phœnix Ins. Co.*, 112 Mass. 49; 17 Am. Rep. 65. Where the certificate required is that of the nearest magistrate, the court will construe it liberally, and not hear nice measurements. *Turley* v. *N. A. Ins. Co.*, 25 Wend. (N. Y.) 374. Where there were two nearer, but they were creditors of the insured, it was held proper to go to a third. *Taylor* v. *Roger Williams Ins. Co.*, 51 N. H. 50; *Wright* v. *Hartford Ins. Co.*, 36 Wis. 522. A mere notice that such certificate will be required is not enough to make it obligatory. *Taylor* v. *Ætna Ins. Co.*, 13 Gray (Mass.), 434.

If the papers offered to them are defective, they must call attention to the defect and insist upon it, and require farther information. *Charleston Ins. Co.* v. *Neve*, 2 McMullen (S. C.), 237; *Patterson* v. *Triumph Ins. Co.*, 64 Me. 500; *State Ins. Co.* v. *Maackens*, 38 N. J. L. 564; *Imperial Ins. Co.* v. *Murray*, 73 Penn. St. 13; *Killips* v. *Putnam Ins. Co.*, 28 Wis. 472; 9 Am. Rep. 506; *Lycoming Ins. Co.* v. *Dunmore*, 75 Ill. 14. All information which the insurers gain by going into an investigation after having received imperfect proofs, inures to the benefit of the insured, so far as it supplies any deficiency. *Sexton* v. *Montgomery Ins. Co.*, 9 Barb. (N. Y.) 191; *Maher* v. *Hibernia Ins. Co.*, 67 N. Y. (22 Sick.) 283. If they make no inquiry for proofs, but make a general investigation of the matter for themselves, it is waiver. *West Rockingham Ins. Co.* v. *Sheets*, 26 Gratt. (Va.) 854.

The insurers are estopped to rely upon any fault which they have contributed to produce, as by refusing to allow the insured to see the proofs which they had furnished, he desiring to perfect them. *Cornell* v. *LeRoy*, 9 Wend. (N. Y.) 163. Where the insurers point out certain defects, they cannot afterward object to others not then named. *Phillips* v. *Protection Ins. Co.*, 14 Mo. 220. A waiver is not established by proof that an agent said it would be all right (*Boyle* v. *N. C. Ins. Co.*, 7 Jones' L. [N. C.] 373), or that an officer, in reply to a question what further proofs were required, answered that the policy would show (*Spring Garden Ins. Co.* v. *Evans*, 9 Md. 1), or an officer's statement that the company would be disposed to do what was right in answer to an excuse for failure to give notice. *Smith* v. *Haverhill Ins. Co.*, 1 Allen (Mass.), 297. The extent of the waiver will be determined by the particular facts of the case, but an express waiver of notice is not a waiver of the preliminary proof, or the particular ac-

count required by the policy when they are treated as separate acts. *Desilver* v. *State Ins. Co.*, 38 Penn. St. 130. If evidence is offered that the notice and preliminary proofs were delivered to the insurer and no objection was made to them, it is enough without proof of their contents (*Hincken* v. *Mutual Benefit Ins. Co.*, 50 N.Y. [5 Sick.] 657); even where the contract provides that any waiver shall be in writing on the policy, this was held not to prevent an estoppel on the insurers from a failure to object when good faith required it. *Blake* v. *Exchange Ins. Co.*, 12 Gray (Mass.), 265. Where the policy requires a particular account, its nature must depend upon the circumstances of the loss and the character of the property. It is an account of the particulars of the nature, quality and quantity of the effects, and of the damage sustained in order to aid the insurers to form a judgment as to the amount of the loss, and also of the cause of the loss. *Catlin* v. *Springfield Ins. Co.*, 1 Sumn. (C. C.) 434. Where the insurers may make a personal inspection so much particularity is not required. *Haff* v. *Mar. Ins. Co.*, 4 Johns. (N. Y.) 132. The fact of loss within the risk, the subject-matter and the amount of injury sustained, are all that it is necessary to state. It is not necessary to state the interest of the insured unless specially required. *Gilbert* v. *North American Ins. Co.*, 23 Wend. (N. Y.) 43; *Miller* v. *Eagle Ins. Co.*, 2 E. D. Smith (N. Y.), 268. Where the party from loss of books and papers or other causes is unable to give more than a general statement of the aggregate value of the property lost, he is excused. *McLaughlin* v. *Washington County Ins. Co.*, 23 Wend. (N. Y.) 525; *Norton* v. *Rensselaer and Saratoga Ins. Co.*, 7 Cow. (N. Y.) 645; *Bumstead* v. *Dividend Ins. Co.*, 12 N. Y. 81; *Hoffman* v. *Ætna Ins. Co.*, 1 Robt. (N. Y.) 501; S. C., 32 N. Y. (5 Tiff.) 405. But it must state the amount of loss and that it is on the goods insured. *Lycoming Ins. Co.* v. *Updegraff*, 40 Penn. St. 311. Where the notice is required to state the value of the parts remaining, it is enough to state a total loss, where only stone and brick of a small value remain and the insurance does not cover the real loss. *Wyman* v. *People's Equity Ins. Co.*, 1 Allen (Mass.), 301. Where it is provided that the insured shall produce his books and papers, he must bring forward all that he has (*O'Brien* v. *Commercial Ins. Co.*, 63 N. Y. [18 Sick.] 108; *Jube* v. *Brooklyn Ins. Co.*, 28 Barb. [N. Y.] 412), but he is excused by their loss in the fire. *Mechanics' Ins. Co.* v. *Nichols*, 16 N. J. 410. He may correct the statement before suit, and such correction will not be evidence of fraud. *Jones* v. *Mechanics' Ins. Co.*, 36 N. J. 19; 13 Am. Rep. 405. Error or even some degree of over estimate is not fraud, but a statement known to be false and unjust is fraud. *Chapman* v. *Pole*, 22 L. T. (N. S.) 306; *Ins. Co. of N. A.* v. *Mc-*

Dowell, 50 Ill. 120; *Ins. Co.* v. *Weides*, 14 Wall. (U. S.) 375; *Planters' Ins. Co.* v. *Deford*, 38 Md. 382. Where it is provided that fraud or false-swearing in the proofs shall prevent recovery, it must be intentional and in regard to some material matter. *Moadinger* v. *Mechanics' Ins. Co.*, 2 Hall (N. Y.), 490; *Marion* v. *Great Republic Ins. Co.*, 35 Mo. 148; *Franklin Ins. Co.* v. *Updegraff*, 43 Penn. St. 350; *Park* v. *Phœnix Ins. Co.*, 19 Up. Can.; *Button* v. *Royal Ins. Co.*, 4 F. & F. 905; *Clark* v. *Phœnix Ins. Co.*, 36 Cal. 168; *Maher* v. *Hibernia Ins. Co.*, 67 N. Y. (22 Sick.) 283. A difference between the estimate of the insured and the amount found by a jury, even if considerable, will not sustain the defense of false swearing, although it may be some evidence on the point. *Franklin Ins. Co.* v. *Culber*, 6 Ind. 137; *Moore* v. *Prot. Ins. Co.*, 29 Me. 97; *Marchesseau* v. *Merchants' Ins. Co.*, 1 Robt. (La.) 438; *Israel* v. *Teutonia Ins. Co.*, 28 La. Ann. 689; *contra*, *Levy* v. *Baillie*, 7 Bing. 349; *Wall* v. *Howard Ins. Co.*, 51 Me. 32. If the proofs disclose a defense, the insured is bound by it unless he amends. *Campbell* v. *Charter Oak Ins. Co.*, 10 Allen (Mass.), 213; *Irving* v. *Excelsior Ins. Co.*, 1 Bosw. (N. Y.) 507. If the payment is got by fraudulent proofs on which the insurer so far relied that they would not otherwise have paid the loss, the sum paid may be recovered back again. *Hartford Ins. Co.* v. *Mathews*, 102 Mass. 221. So, if the payment is in ignorance of some good defense. *Columbus Ins. Co.* v. *Walsh*, 18 Mo. 229; *Anderson* v. *Pitcher*, 2 B. & P. 164; *DeHahn* v. *Hartley*, 1 T. R. 343; S. C., 2 id. 186. But a clear mistake must be established. *Elting* v. *Scott*, 2 Johns. (N. Y.) 157; *Berkshire Ins. Co.* v. *Sturgis*, 13 Gray (Mass.), 177. A mistake of law is not enough. *Perry* v. *Newcastle Ins. Co.*, 8 U. C. Q. B. 363. A statement in the proofs that the premises were vacant may be explained by parol. *Cummins* v. *Agricultural Ins. Co.*, 67 N. Y. (22 Sick.) 268. The insured must see that his proofs reach the insurer. *Hodgkins* v. *Montgomery County Ins. Co.*, 34 Barb. (N. Y.) 213.

§ 3. **To whom payable.** The name of the insured does not always appear in the contract, as where the insurance is made for whom it may concern, or the description may be uncertain or ambiguous, as, for instance, an insurance payable to "the estate of A." In such case parol evidence is admitted to make clear who were really meant. *Clinton* v. *Hope Ins. Co.*, 45 N. Y. (6 Hand) 454; *Mathews* v. *Queen City Ins. Co.*, 2 Cinn. (Ohio) 109. Where the policy has been assigned, the loss is of course payable to the assignee, and he may sue in his own name, if the assignment has been assented to, otherwise in the name of the insured. *Kingsley* v. *N. E. Ins. Co.*, 8 Cush. (Mass.) 393; *Phillips* v. *Merrimack Ins. Co.*, 10 Cush. (Mass.) 350; *contra*, *Jessel* v. *Wil-*

liamsburgh Ins. Co., 3 Hill (N. Y.), 88. If the policy is payable, in case of loss, to a third person, he may sue in his own name. *Motley* v. *Manufs. Ins. Co.*, 29 Me. 337; *Cone* v. *Niagara Ins. Co.*, 60 N. Y. (15 Sick.) 619; *Hadley* v. *N. H. Ins. Co.*, 55 N. H. 110. But the insured may sue in his own name with the consent of the person to whom the policy is payable. *Turner* v. *Quincy Ins. Co.*, 109 Mass. 668; *Patterson* v. *Triumph Ins. Co.*, 64 Me. 500; *Illinois Ins. Co.* v. *Stanton*, 57 Ill. 354; *Martin* v. *Franklin Ins. Co.*, 38 N. J. 140; 20 Am. Rep. 372; *St. Paul Ins. Co.* v. *Johnson*, 77 Ill. 598. But one for whose benefit insurance is made cannot sue. *Bailey* v. *N. E. Ins. Co.*, 114 Mass. 177; 19 Am. Rep. 329. Where there is an order indorsed on the policy and assented to by the company, the payee may sue in his own name. *Barrett* v. *Union Ins. Co.*, 7 Cush. (Mass.) 175. In mutual companies, however, where the insured becomes a member of the company, the assignee cannot sue in his own name until he has taken the place of his assignor. *Blanchard* v. *Atlantic Ins. Co.*, 33 N. H. 9; *Mann* v. *Herkimer County Ins. Co.*, 4 Hill (N. Y.), 187. If the policy be in the name of the agent of several parties, it may be sued in his name. *Barnes* v. *Mutual Ins. Co.*, 45 N. H. 21; *Bridge* v. *Niagara Ins. Co.*, 1 Hall (N. Y.), 247. So, if issued to a broker for whom it may concern. *Prot. Ins. Co.* v. *Wilson*, 6 Ohio St. 553. An administrator has no interest in real estate insured, and cannot recover the insurance on a loss occurring after his appointment. *Beach* v. *Bowery Ins. Co.*, 8 Abb. Pr. (N. Y.) 261; *contra*, *Germania Ins. Co.* v. *Curran*, 8 Kan. 9. Where a mortgagee insures his interest for his own benefit, the mortgagor cannot claim to have it applied on the debt (*White* v. *Brown*, 2 Cush. [Mass.] 412), but if the insurance is made by agreement with him and at his cost, he can. *Concord Ins. Co.* v. *Woodbury*, 45 Me. 447. Where the insurance is made by agreement between the mortgagor and the mortgagee, there is no subrogation of the insurance company on payment (*Kernochan* v. *N. Y. Bowery Ins. Co.*, 17 N. Y. 428), even though the policy provides for an assignment of the mortgage to the insurers (*Foster* v. *Van Reed*, 5 Hun [N. Y.], 321), and so in case of an incomplete sale. *Clinton* v. *Hope Ins. Co.*, 45 N. Y. 454. Where the mortgagee insures his own interest, he may recover, even after his debt has been paid. *Norwich Ins. Co.* v. *Boomer*, 52 Ill. 442; 4 Am. Rep. 618. The mortgagee has no interest in an insurance effected by the mortgagor. *McDonald* v. *Black*, 20 Ohio, 185: *Columbia Ins. Co.* v. *Lawrence*, 10 Pet. (U. S.) 507; *Mandegraaff* v. *Medlock*, 3 Port. (Ala.) 389. If the insurance is in the name of the mortgagor, but payable to the mortgagee, it may be paid to the mortgagor after the mortgage is

satisfied. *Ennis* v. *Harmony Ins. Co.*, 3 Bosw. (N. Y.) 516. The assignee of a vendor's interest in a contract for the sale of land, which provides for an insurance by the vendee, for the vendor, is equitably entitled to the money due from such insurance, and the insurer is bound after notice, although the policy forbids an assignment without the insurer's consent. *Cromwell* v. *Brooklyn Ins. Co.*, 44 N. Y. (5 Hand) 42; 4 Am. Rep. 641. Where a tenant agrees to insure for the benefit of his landlord, the premises being divided, the landlord is entitled to the whole in case of loss. *Hamilton* v. *Fleming*, 9 Ct. Sess. Cas., 3rd ser. (Scotch) 329. The payment of the loss did not, at common law, give the insurer any right to claim damages from the person who caused the fire (*London Ass. Co.* v. *Sainsbury*, 3 Doug. 245), unless he owed them some duty. *Rockingham Ins. Co.* v. *Bosher*, 39 Me. 253; *Conn. Ins. Co.* v. *N. Y. & N. H. R. R.*, 25 Conn. 265; *Anthony* v. *Slaid*, 11 Metc. (Mass.) 290. On the other hand, it is no defense to the person who caused the destruction of another's house by fire, that the owner has received full indemnity by the insurance. *Hayward* v. *Cain*, 105 Mass. 213; *Harding* v. *Townshend*, 43 Vt. 536; 5 Am. Rep. 304; *Weber* v. *Morris & Essex Railroad*, 35 N. J. 409; 10 Am. Rep. 253; *Perrott* v. *Shearer*, 17 Mich. 48; *Collins* v. *N. Y. Central Railroad*, 5 Hun (N. Y.), 503. But the insurers have a right of subrogation, under which they may use the name of the insured to recover from any person liable to him the amount they have been compelled to pay. *Monmouth County Ins. Co.* v. *Hutchinson*, 21 N. J. Eq. 107. If the insured sue the wrong-doer first and recover satisfaction from him, he loses any claim against the insurers. *Mason* v. *Sainsbury*, 3 Doug. 61. Thus, insurers may use the name of the insured to recover indemnity from a railroad company which set the fire, and the owner has no control over the action. *Hart* v. *Western Railroad*, 13 Metc. (Mass.) 99; *Hall* v. *N. & C. R. R.*, 13 Wall. (U. S.) 367; *Gales* v. *Hailman*, 11 Penn. St. 515; *Peoria Ins. Co.* v. *Frost*, 37 Ill. 333. There must be full payment before the right arises. *People's Ins. Co.* v. *Strachle*, 2 Cinn. (Ohio) 186; *Neptune Ins. Co.* v. *Dorsey*, 3 Md. Ch. 338; *Kyner* v. *Kyner*, 6 Watts (Penn.), 221. The insured cannot release the wrong-doer so as to bar the insurer of his right. *Hart* v. *Western Railroad*, 13 Metc. (Mass.) 99. This right only exists in favor of those who have a relation of contract with the party suffering the loss. A stranger cannot gain the right, nor does he diminish the liability by satisfying the loss to the insured. *People's Ins. Co.* v. *Strachle*, 2 Cinn. (Ohio) 186. Unless the insured is affected by some arrangement with the mortgagor, the insurer, who has paid the loss to the mortgagee, cannot claim an assignment. *Suffolk Ins.*

Co. v. *Boyden*, 9 Allen (Mass.), 123; *Kip* v. *Mut. Ins. Co.*, 4 Edw. Ch. (N. Y.) 86. In *Sussex County Ins. Co.* v. *Woodruff*, 26 N. J. 541, it was held that the insurer, who had paid the creditor, had a right to all his securities. In *Benjamin* v. *Saratoga County Ins. Co.*, 17 N. Y. (3 Smith) 415, no subrogation was allowed. Where the vendee was to pay to the vendor the premiums, and the insurers knew of this agreement and assented, the insurer has only the same right the person has, to whose person he is subrogated. *Alliance Ins. Co.* v. *Louisiana State Ins. Co.*, 8 La. (O. S.) 1. It is usual to insert a provision that the insured shall assign all claim which he may have against others, and in such case the insurer stands like a surety, and is discharged by any act of the insurer which renders an effectual assignment possible. *Davis* v. *Quincy Ins. Co.*, 10 Allen (Mass.), 113.

ARTICLE IX.

LIMITATIONS AS TO ACTIONS; ARBITRAMENT.

Section 1. In general. The right to bring an action upon the policy may be limited in either of several ways. It is limited as to the time when it first accrues. The insured has no right of action until there has been some failure of performance on the part of the insurer. The insured must have performed all things which are imposed on him as his duty, before he can complain of any fault on the part of the other party. He must have complied with all conditions as to preliminary notices and proofs. The contract often farther provides that the loss shall not be payable for a certain specified time after the preliminary proofs are furnished. There is no breach till that time is passed. *Harris* v. *Prot. Ins. Co.*, 1 Wright (Ohio), 548. If new proofs are substituted for others which were defective, the time is reckoned from the delivery of the new proofs. *Kimball* v. *Hamilton Ins. Co.*, 8 Bosw. (N. Y.) 495. On the other hand, after the right of action has once accrued, it is subject to the ordinary provisions of the statute of limitations of personal actions, and in most States would have to be brought within six years from the day on which it accrued. It is, however, common in policies of insurance to provide that no action shall be commenced after some shorter period has elapsed, and that the lapse of this period shall be conclusive evidence against any claim asserted under it. The alleged object of this provision is protection against fraud. It is always important that matters of the nature of insurance should be investigated while the matter is fresh, and evidence can be obtained. It is also found that the nature of the contract is such that an immediate settle-

ment is always expected and demanded by both parties, and it may be considered as contemplated by the contract. Any unusual delay in prosecuting the claim would always be ground for suspicion of its honesty, as unusual conduct always calls for explanation. It has accordingly been decided that such condition is valid and binding. *Amesbury* v. *Bowditch Ins. Co.*, 6 Gray (Mass.), 596; *Riddlesbarger* v. *Hartford Ins. Co.*, 7 Wall. (U. S.) 386; *Brown* v. *Roger Williams Ins. Co.*, 7 R. I. 301; S. C., 1 id. 30; *Merchants', etc., Ins. Co.* v. *La Croix*, 45 Tex. 152; *Wilson* v. *Ætna Ins. Co.*, 27 Vt. 99; *Peoria Ins. Co.* v. *Whitehall*, 25 Ill. 466; *Portage County Ins. Co.* v. *West*, 6 Ohio St. 599; *Carter* v. *Humboldt Ins. Co.*, 12 Iowa, 287; *Ripley* v. *Ætna Ins. Co.*, 29 Barb. (N. Y.) 552; 30 N. Y. (3 Tiff.) 136.

§ 2. **Conditions as to actions.** In *Judkins* v. *Union Ins. Co.*, 39 N. H. 172, a provision in the policy that no execution should issue on a judgment recovered on the policy for three months after it was rendered, was enforced. In other States all provisions of the contract would be merged in the judgment. In case of reinsurance, payable within a limited time after the loss, the loss refers to the damage caused by the peril insured against, and not to the payment of that damage by the reinsured. *Providence Ins. Co.* v. *Ætna Ins. Co.*, 16 Up. Can. 135; *Carraway* v. *Merchants' Ins .Co.*, 26 La. Ann. 298. In other cases the words "after loss or damage shall accrue," was held to mean after the right of action shall accrue. *New York* v. *Hamilton Ins. Co.*, 39 N. Y. (12 Tiff.) 45; *Black* v. *Winneshiek Ins. Co.*, 31 Wis. 74; *Chandler* v. *St. Paul Ins. Co.*, 21 Minn. 85; 18 Am. Rep. 385. After the expiration of the time limited, a new promise will not revive any right of action. *Williams* v. *Vermont Ins. Co.*, 20 Vt. 222. But it would seem that the time may be extended before its expiration by a modification of the contract. If the period limited is unreasonably short, it may raise a presumption of fraud or imposition. *Brown* v. *Savannah Ins. Co.*, 24 Ga. 97. Where the period has expired, the insured have attempted in various ways to avoid the bar. It has been held that it did not help them to prove that a previous suit had been commenced, which failed for some technical reason, or was nonsuited. *Riddlesbarger* v. *Hartford Ins. Co.*, 7 Wall. (U. S.) 386; *Brown* v. *Roger Williams Ins. Co.*, 7 R. I. 301; *Wilson* v. *Ætna Ins. Co.*, 27 Vt. 99. Ignorance of the condition is no excuse. *Underwriters' Agency* v. *Sutherlin*, 55 Ga. 266; *DeGrove* v. *Metropolitan Ins. Co.*, 61 N. Y. (16 Sick.) 594; 19 Am. Rep. 305. But if the failure was caused by the fault or fraud of the insurer, he may be estopped to plead the provision. *Ames* v. *N. Y. Union Ins. Co.*, 14 N. Y. 253; *Andes Ins. Co.* v. *Fish*, 71 Ill. 620; *Derrick* v. *Lamar Ins. Co.*, 74 id. 404. Thus where he was

absent from the State at the time, and still more if he concealed himself, he could have no advantage from the clause. *Peoria Ins. Co.* v. *Hall*, 12 Mich. 202. In *Ketchum* v. *Prot. Ins. Co.*, 1 Allen (N. B.), 136, the court were inclined to think absence alone not enough. Pending negotiations are not enough, unless the insured is misled (*Coursin* v. *Penn. Ins. Co.*, 46 Penn. St. 323; *Gooden* v. *Amoskeag Ins. Co.*, 20 N. H. 73; *Mickey* v. *Burlington Ins. Co.*, 35 Iowa, 174; 14 Am. Rep. 494; *Brady* v. *Western Ass. Co.*, 17 U. C. C. P. 597); nor that the insurers promised to write and inform the insured what they would do. *McFarland* v. *Peabody Ins. Co.*, 6 W. Va. 425. Where war makes a suit within the limited time impossible, this condition is not suspended, but is rather made wholly ineffectual, and, on the return of peace, the insured has the usual time allowed other litigants in which to sue. *Semmes* v. *City Ins. Co.*, 13 Wall. (U. S.) 158. Where, in the performance of the other conditions which are to precede payment, so much time is spent that the loss has not become payable at the end of the time allowed for suit, the provisions are inconsistent, and the latter becomes void. *New York* v. *Hamilton Ins. Co.*, 10 Bosw. (N. Y.) 537; *Stout* v. *City Ins. Co.*, 12 Iowa, 371; *Longhurst* v. *Star Ins. Co.*, 19 Iowa, 364. In the two last cases the interest insured was a mechanic's lien, and it was necessary to determine its value by a judgment before adjustment. Collateral proceedings, like bills in equity to complete the issue of a policy, or to reform a policy (*Perley* v. *Beacon Ins. Co.*, 7 Gran. [Can.] 130; *Woodbury Bank* v. *Charter Oak Ins. Co.*, 31 Conn. 517); or *scire facias* by a creditor who has attached the sum due on trustee process (*Harris* v. *Phœnix Ins. Co.*, 35 Conn. 310); or a suit to enforce the liability of a stockholder (*Davis* v. *Stewart*, 26 Ohio St. 643), are not within this provision.

The condition is construed strictly. Thus, where it read "in case of disputed claims," the limitation shall apply, there must be evidence that there were disputes as to the payment *People* v. *Liverpool Ins. Co.*, 2 N. Y. Sup. (T. & C.) 268. If it appears that adjustment is to precede suit, the limitation only applies where there has been an adjustment. *Nevins* v. *Rockingham Ins. Co.*, 25 N. H. 22; *Landis* v. *Home Ins. Co.*, 56 Mo. 591; *Arnet* v. *Mechanics' Ins. Co.*, 22 Wis. 516; *contra*, *Dutton* v. *Vermont Ins. Co.*, 17 Vt. 369. The issuing of the writ, not its service, is the beginning of the action. *Peoria Ins. Co.* v. *Hall*, 12 Mich. 202. As we have said, the condition may be waived, and being a harsh one, a waiver will be easily presumed. The waiver is usually a question for the jury. *Ripley* v. *Ætna Ins. Co.*, 29 Barb. (N. Y.) 552; *Coursin* v. *Penn. Ins. Co*, 46 Penn. St. 323; *Columbian Ins. Co.* v. *Lawrence*, 2 Pet. (U. S.) 25; *Graves* v. *Washington Ins. Co.*, 12 Allen (Mass.), 391.

But mere silence is no waiver, as there is no duty on the insurers to speak (*Schroeder* v. *Keystone Ins. Co.*, 2 Phila. 286); though it may be evidence (*Ripley* v. *Ætna Ins. Co.*, 29 Barb. [N. Y.] 552); nor are conversations about a settlement or an absolute refusal to pay on other grounds, as the insured could not be misled thereby. *Lambkin* v. *Western Ass. Co.*, 13 Up. Can. 361. But acts of the insurer performed with the intention of inducing the insured to delay, under a belief that his rights were safe, and which had that effect, are an estoppel. *Mickey* v. *Burlington Ins. Co.*, 35 Iowa, 174; 14 Am. Rep. 494; *Grant* v. *Lexington Ins. Co.*, 5 Ind. 23; *Fullam* v. *N. Y. Union Ins. Co.*, 7 Gray (Mass.), 61; *Black* v. *Winneshiek Ins. Co.*, 31 Wis. 74; *Curtis* v. *Home Ins. Co.*, 1 Biss. (C. C.) 485; *Derrick* v. *Lamar Ins. Co.*, 74 Ill. 404. Suit means any legal proceeding to recover the loss. Thus, a proceeding by foreign attachment by a creditor is a compliance with the condition. *Harris* v. *Phœnix Ins. Co.*, 35 Conn. 310. But the creditor in such case must rest on the strength of the claim of the insured. Id. A limitation of the venue of any action upon the policy is invalid. The parties have no power to limit the jurisdiction of courts. *Nute* v. *Hamilton Ins. Co.*, 6 Gray (Mass.), 174; *Richard* v. *Manhattan Ins. Co.*, 31 Mo. 518. If the charter fixes the venue, it may be changed by the legislature. *Howard* v. *Kentucky Ins. Co.*, 13 B. Monr. (Ky.) 282; *Sanders* v. *Hillsborough Ins. Co.*, 44 N. H. 238. Where the charter provides that the directors of the insurance company shall proceed to determine the amount, and if the insured shall be dissatisfied, he may proceed in a particular court, he is not confined to that court, if the directors do not determine the amount, but refuse absolutely to pay. *Martin* v. *Penobscot Ins. Co.*, 53 Me. 419; *Boynton* v. *Middlesex Ins. Co.*, 4 Metc. (Mass.) 212; *contra*, *Dutton* v. *Vermont Ins. Co.*, 17 Vt. 369.

§ 3. **Condition as to arbitration.** A provision for a compulsory arbitration of all matters in dispute will not be enforced. *Thompson* v. *Charnock*, 8 T. R. 139; *Goldstone* v. *Osborn*, 2 C. & P. 550; *Scott* v. *Avery*, 5 H. L. C. 811; *Trott* v. *City Ins. Co.*, 1 Cliff. (C. C.) 439; *Stephenson* v. *Piscataqua Ins. Co.*, 54 Me. 55; *Liverpool Ins. Co.* v. *Creighton*, 51 Ga. 95. If the parties, however, proceed under such agreement it will bind them. *Roper* v. *Lendon*, 1 El. & El. 825; *Kill* v. *Hollister*, 1 Wils. 129; *Richardson* v. *Suffolk Ins. Co.*, 3 Metc. (Mass.) 573. An agreement to refer a special matter, such as the amount of loss, the time of payment, and other like questions, is valid. *Braunstein* v. *Accidental Death Ins. Co.*, 1 B. & S. 782; *Trott* v. *City Ins. Co.*, 1 Cliff. (C. C.) 439. If the act of incorporation provided for arbitration, the court would be bound. *Crisp* v. *Bunbury*, 8 Bing. 394; *Ex parte Payne*, 5 D. & L. P. C. 679. Where the

policy provided that "in case any difference shall arise touching any loss or damage, such difference shall be submitted to arbitrators, whose award shall be final," it was sustained. *Elliott* v. *Royal Exchange Ins. Co.*, 2 L. R. Exch. 237. So where it was provided that the payment of the loss was to be on condition that in the opinion of the surgeon-general the insured did not die from intemperance. *Campbell* v. *American Popular Ins. Co.*, 4 L. T. (N. S.) 6. Where the policy provided that in case of forfeiture the insured should have the benefit of such equitable adjustment as the directors should from time to time provide, it was discretionary with the directors to act in the matter of establishing any mode of adjustment, although, when once established, they might not have power to change it to the injury of existing policies. *Nightingale* v. *State Ins. Co.*, 5 R. I. 38. While such previous agreement for a reference may be voidable, yet the parties have power, after the controversy has arisen, to agree upon an arbitration, which agreement will bind them, and of course, they can equally ratify the previous agreement. If, then, it appears that they have, after the controversy, treated the agreement to refer as binding, as for instance, by going on with a hearing under it, it will be a ratification, and they will be bound. *Roper* v. *Lendon*, 1 El. & El. 825; *Burchell* v. *Marsh*, 17 How. (U. S.) 344; *Kill* v. *Hollister*, 1 Wils. 129; *Richardson* v. *Suffolk Ins. Co.*, 3 Metc. (Mass.) 573. A refusal to pay without any offer to refer is a waiver of the provision. *Robinson* v. *Georges Ins. Co.*, 17 Me. 131; *Millaudon* v. *Atlantic Ins. Co.*, 8 La. (O. S.) 558.

TITLE II.

OF LIFE INSURANCE.

ARTICLE I.

OF LIFE INSURANCE IN GENERAL.

Section 1. In general. It is said that the contract commonly called life insurance, when properly considered, is a mere contract to pay a certain sum of money on the death of a person, in consideration of the due payment of a certain annuity for his life, or some shorter period, by him, the annuity being calculated according to his probable chance of longevity, and that this contract in no way resembles a contract of indemnity, and in this respect differs from both fire and marine

policies. In policies for life, the loss is sure to come, and the only uncertain element is the date when it will come. *Dalby* v. *London Ass. Co.*, 15 C. B. 365. In some of its forms, however, life insurance seems to be clearly a contract of indemnity. Where, for instance, a creditor insures the life of his debtor, he is thereby indemnified against the loss of his debt which may follow his sudden death. In such case, where the debtor has paid the premiums, the debtor is entitled to claim the policy when the debt is paid. *Knox* v. *Turner*, L. R., 9 Eq. 155. In other cases, as where the life of a husband is insured for the benefit of his wife, it is also an indemnity to her for a loss, which may have in it an unliquidated pecuniary element. This is more evident, when, as often in England, it is made a covenant in the marriage settlement that the intended husband shall insure his life. The same considerations apply with less force perhaps in other cases of insurance between relatives. In ordinary policies of life insurance, the damages resulting are unliquidated, at the same time danger of fraudulent loss is much diminished, being almost confined to the offering for insurance of bad lives. Therefore it is more assimilated to other commercial transactions, like the deposit of savings, or the discount of notes. A man purchases, for a certain sum, a bill, by which he is entitled to be repaid a larger sum at a fixed future time. He deposits a certain sum with the hope of drawing a larger sum at some uncertain future time. He pays a premium and thereby purchases a contract by which he is to be paid a certain sum at an uncertain time. In case of what are called endowment policies of life insurance, this is still more evident, where a young man takes an endowment policy on a short term, the only element of chance is the contingency of his dying during the term and the indemnity, for that forms but a very small share of the premium.

§ 2. **Insurable interest.** It is essential that the insurer should have an interest in the life of the person insured. *Guardian Ins. Co.* v. *Hogan*, 80 Ill. 36; *Franklin Ins. Co.* v. *Sefton*, 53 Ind. 380. But this, like all other principles, is to be construed with reference to the objects for which it is established. It is founded on the repugnance of the law to wagering or gambling contracts, in other words, those by which the person contracting may acquire gain without the risk of some proportionate loss. It would at first seem difficult to see how a person can have an insurable interest in his own life, for the contract affords no compensation to him. But such policies must rather be considered as resting upon the interest which his representatives have in his life. *Provident Ins. Co.* v. *Baum*, 29 Ind. 236. Where some other person than the insured makes the contract, in order to support it some direct interest must be proved, for else it would not only be a

wagering contract, but an impertinent interference with a third party, on whose life the contractors would put a price. What the required interest is, will be illustrated by the following decisions. Where a young woman was without property and had been supported and educated by her brother, who stood to her *in loco parentis*, and whose death would have left her destitute, and he was about to go to South America, it was held that she could insure his life for her own benefit. *Lord* v. *Dall*, 12 Mass. 115. The interest must be a pecuniary one, otherwise the loss could not be made good by money. *Halford* v. *Kymer*, 10 B. & C. 725. If a son is a minor, who can render service, and to whom advances have been made, his father has an insurable interest. *Mitchell* v. *Union Ins. Co.*, 45 Me. 104. In *Loomis* v. *Eagle Ins. Co.*, 6 Gray (Mass.), 396, the court go further and say, we cannot doubt that a parent has an interest in the life of a child and *vice versa* a child in the life of a parent, not merely because they are bound to support their lineal kindred when in need of relief, but upon considerations of strong morals and the force of natural affections between near kindred, operating more efficaciously than those of positive law. *Reserve Ins. Co.* v. *Kane*, 81 Penn. St. 154; *Hoyt* v. *N. Y. Ins. Co.*, 3 Bosw. (N. Y.) 440; *Miller* v. *Eagle Ins. Co.*, 2 E. D. Smith (N. Y.), 286; *contra*, *Guardian Ins. Co.* v. *Hogan*, 80 Ill. 35. A wife has sufficient interest in the life of her husband, and divorce will not deprive her of her insurance. *McKee* v. *Phœnix Ins. Co.*, 28 Mo. 383. So even of a woman not married, but living with a man as his wife and treated and supported as such. *Equitable Ass. Soc.* v. *Patterson*, 41 Ga. 338; 5 Am. Rep. 535. So a woman under contract of marriage has an interest in the life of her intended husband. *Chisholm* v. *National Capital Ins. Co.*, 52 Mo. 213; 14 Am. Rep. 514. A creditor has an interest in the life of his debtor. *Anderson* v. *Edie*, cited in Park on Ins. 432. Even if the debt is one which is voidable (id.) or to which the statute of limitations may be pleaded as a bar. *Rawls* v. *American Ins. Co.*, 36 Barb. (N. Y.) 357; S. C., 27 N. Y. (13 Smith) 282; *Mowry* v. *Home Ins. Co.*, 9 R. I. 346. So where a partnership is formed, money being placed against skill, in dividing the profits, the partners advancing money may insure the other partner's life. *Valton* v. *National Loan Fund Ass. Soc.*, 22 Barb. (N. Y.) 9; S. C., 20 N. Y. (6 Smith) 32. Of the same nature is a loan to start another in business, with a promise of repayment with profits. *Bevin* v. *Conn. Ins. Co.*, 23 Conn. 244; *Morrell* v. *Trenton Ins. Co.*, 10 Cush. (Mass.) 282; *Trenton Ins. Co.* v. *Johnson*, 24 N. J. 577. A servant has an insurable interest in the life of his master who has employed him for a fixed term (*Hebdon* v. *West*, 3 Best & Sm. 578);

and a master in the life of his servant. *Miller* v. *Eagle Ins. Co.*, 2 E. D. Smith (N. Y.), 268. A promise by a creditor that a debt shall not be called for while he lives does not give the debtor an insurable interest. *Hebdon* v. *Best*, 3 B. & S. 578. A policy cannot be assigned to one who has no interest. *Franklin Ins. Co.* v. *Sefton*, 53 Ind. 380; *contra*, *Valton* v. *Nat. Life Ass.*, 20 N. Y. (6 Smith) 32.

§ 3. **Warranty.** A warranty is a condition precedent, and its terms must be strictly complied with. *Barteau* v. *Phœnix Ins. Co.*, 67 N. Y. (22 Sick.) 595. It lies at the base of the contract, and the insured can recover only when he has fulfilled its conditions. Any statement upon the literal truth or fulfillment of which the validity of the contract depends, is a warranty. The parties may make any statement a warranty, even if it is of no importance. Yet, its importance is an element in determining what the meaning is. *O'Niel* v. *Buffalo Ins. Co.*, 3 Comst. (N. Y.) 122.

The whole contract is to be construed together. *Campbell* v. *N. E. Ins. Co.*, 98 Mass. 381; *Price* v. *Phœnix Ins. Co.*, 17 Minn. 497; 10 Am. Rep. 166. The courts will endeavor to construe the policy so that it may be supported by a substantial compliance with its provisions. Thus where an inquiry is made whether the applicant has suffered any serious injury, it will be held to refer not to the pain caused by it, but to its effect on the applicant's health at the time of insurance. *Union Ins. Co.* v. *Wilkinson*, 13 Wall. (U. S.) 222; *Higbee* v. *Guardian Ins. Co.*, 66 Barb. (N. Y.) 462. If, however, he answers untruly any question where the answer is made a warranty, as by denying that he has had a disease named (*Barteau* v. *Phœnix Ins. Co.*, 1 Hun [N. Y.], 430; 3 N. Y. Sup. [T. & C.] 576; *Foot* v. *Ætna Ins. Co.*, 4 Daly [N. Y.], 285; 61 N. Y. [16 Sick.] 571; *Vose* v. *Eagle Ins. Co.*, 6 Cush. [Mass.] 72); or denying that he had a family physician (*Monk* v. *Union Ins. Co.*, 6 Robt. [N. Y.] 455); the question arises as to his belief or the materiality of the matters inquired about, but the policy is void. *Mutual Benefit Ins. Co.* v. *Cannon*, 48 Ind. 264; *Anderson* v. *Fitzgerald*, 4 H. L. Cas. 484. It will not help the insured that he was entirely ignorant of the disease. *Duckett* v. *Williams*, 4 Tyrw. 240. Where the warranty is that the insured has had no disease, it may be for the jury or the court to decide the validity of the policy, for not every slight indisposition is, as matter of law, a disease. *Life Ins. Co.* v. *Francisco*, 16 Wall. (U. S.) 672. Severe sickness does not refer to the ordinary diseases of the country which readily yield to medical treatment. *Southern Ins. Co.* v. *Wilkinson*, 53 Ga. 535; *Boos* v. *World Ins. Co.*, 64 N. Y. 236. So, "in good health" does not imply absolutely perfect health. *Peacock* v. *N. Y. Ins. Co.*,

20 N. Y. 293. A mere statement of the occupation of the insured is not a warranty. *Providential Ins. Co.* v. *Fennell*, 49 Ill. 180; *Perrins* v. *Gen. Travelers' Ins. Co.*, 2 El. & El. 317.

§ 4. **Representations.** A representation is a statement incidental to the contract, upon the faith of which the contract is entered into. If false and material to the risk, it avoids the contract. *Mutual Benefit Ins. Co.* v. *Miller*, 39 Ind. 475. It differs from a warranty in that a less strict compliance with its terms by the insured is required. *Higbee* v. *Guardian Ins. Co.*, 66 Barb. (N. Y.) 462; 53 N. Y. (8 Sick.) 603. But even if made by mistake and in good faith, a breach avoids the policy. The policy, however, often calls only for good faith and then error will not avoid it. The misrepresentation must be material. *Barteau* v. *Phœnix Ins. Co.*, 67 N. Y. (22 Sick.) 595. The parties may decide in the contract what is material. The question of the truth of the statement will ordinarily be for the jury. Thus, where the applicant in answer to a question whether he had had rheumatism, or had had any severe sickness, said that he had not and it was proved that he had had subacute rheumatism, and gastritis, it was left to the jury to determine whether the answers were true. *Price* v. *Phœnix Ins. Co.*, 17 Minn. 497; 10 Am. Rep. 166. So if the question be, whether he is employed in the military service, the jury must decide whether the facts show such an employment; or whether he has had any sickness, they may determine whether the facts proved amounted to sickness, as understood by the parties. But they cannot consider whether the matters inquired about are material. *Mutual Benefit Ins. Co.* v. *Wise*, 34 Md. 583. The representation must continue true up to the time when the contract is closed. Any change in the health or circumstances of the parties during the negotiations which would naturally have an influence on the insurers to deter them from making the contract must be disclosed. *Rose* v. *Med. Ins. Co.*, 11 Ct. of Sess. (S. C.) 2d Ser. 345. Such for instance as a change from a mild to a severe type of disease. *Brady* v. *N. W. Ins. Co.*, 11 Mich. 425. If the representation is true when the bargain is closed, a subsequent change is immaterial. *Reichard* v. *Manhattan Ins. Co.*, 31 Mo. 518; *Benham* v. *United Guaranty Ass. Co.*, 7 Exch. 744. If the insurer desires to have any control over such matters, he must make them a part of the contract. If a written application be made, proof of verbal statements will be excluded. *Rawls* v. *American Ins. Co.*, 27 N. Y. (13 Smith) 282. If the parties have not in the contract determined the question of the materiality of the representation, it may be a question for the jury to determine from the circumstances. Thus, representations as to the pecuniary means or social or business relations of the

insured may be material if they influenced the insurers, as that he was a partner and the moneyed man of a firm, to the other alleged members of which he assigned the policy. *Valton* v. *National Loan Fund Ass. Soc.*, 20 N. Y. (6 Smith) 32. Whether a false representation that the party had no other insurance on his life was material, was left to the jury. *Wainewright* v. *Bland*, 1 M. & R. 481; S. C., 6 Tyrw. 417. Where the statement is that the applicant never used opium, liquor or tobacco, their use as medicines does not make the representation false. *Higbee* v. *Guardian Ins. Co.*, 66 Barb. 462; 53 N. Y. (8 Sick.) 603. A verbal statement on receiving a renewal receipt is a mere representation and does not make the policy void, unless it is material and induced the continuance of the policy. *Mutual Benefit Ins. Co.* v. *Robertson*, 59 Ill. 123; 14 Am. Rep. 8. The burden of proving the answers to the insurer's questions untrue, is upon the insurer. *Piedmont Ins. Co.* v. *Ewing*, 92 U. S. 377; *Jones* v. *Brooklyn Ins. Co.*, 61 N. Y. 79. Where it was stipulated in the application that the answers were fair and true, that they should form the basis of the contract, that if any of them were untrue or fraudulent they should avoid the policy, they were material representations, not warranties. *Price* v. *Phœnix Ins. Co.*, 17 Minn. 497; 12 Am. Rep. 166. It is for the jury to determine whether there has been a substantial compliance with the representations or whether they are substantially true. *Miller* v. *Mutual Benefit Ins. Co.*, 31 Iowa, 216; 7 Am. Rep. 122; *Mutual Benefit Ins. Co.* v. *Wise*, 34 Md. 582. Thus the jury passed upon the question whether a certain disease was bronchitis (*Campbell* v. *N. E. Ins. Co.*, 98 Mass. 381), or whether another disease was rheumatism, or whether it constituted a severe sickness. *Price* v. *Phœnix Ins. Co.*, 17 Minn. 497; 10 Am. Rep. 166. It is enough if the jury find the representation to be substantially, though not literally, true. *N. A. Ins. Co.* v. *Throop*, 22 Mich. 146; 7 Am. Rep. 638; *Higbee* v. *Guardian Ins. Co.*, 66 Barb. (N. Y.) 462; 53 N. Y. (8 Sick.) 603; *Buford* v. *N. Y. Ins. Co.*, 5 Oreg. 334. A comparison of the different parts of the policy may reduce what would otherwise be a warranty to a representation. Thus where a statement is required to be true, but the form given is a statement to the best of the applicant's belief, or it is afterward provided that the fraudulent statements shall make the policy void, it is a representation. *Fowkes* v. *Manchester Ass. Co.*, 3 F. & F. 440; *Washington Ins. Co.* v. *Harney*, 10 Kans. 525. Though the false answers are inserted by the fraud of the agent, the policy is still void. *Ryan* v. *World Ins. Co.*, 41 Conn. 168; 19 Am. Rep. 490; *contra*, *Rockford Ins. Co.* v. *Nelson*, 75 Ill. 548.

§ 5. **Concealment.** A concealment corresponds negatively to a representation. One misleads the insurer by the statement of what is false, the other equally misleads him by the concealment of what he ought to know. It is the designed intentional withholding of some fact material to the risk, which good faith required that the insured should disclose. That which the contract in terms requires the insured to disclose is, not the subject of concealment, but of warranty, or of representation, of which we have treated above. In determining whether the withholding of information was intentional, the insured will be presumed to possess ordinary intelligence and knowledge. If he is asked whether he has any disease, and he does not know that he has, yet he is bound to disclose any symptoms of disease. *Vose* v. *Eagle Ins. Co.*, 6 Cush. (Mass.) 42; *Miles* v. *Conn. Ins. Co.*, 3 Gray (Mass.), 580. Where the insured omitted to mention that he had at a previous time been insane, it was no concealment, if no question on the point was asked, although the insurers did not wish to insure insane persons. *Mallory* v. *Travelers' Ins. Co.*, 47 N. Y. 52; 7 Am. Rep. 410. Where the applicant was asked whether he had had any sickness within ten years, he was not wrong in omitting to mention a slight indisposition which would not ordinarily be called a sickness. *Wise* v. *Mutual Benefit Ins. Co.*, 34 Md. 582; *Britton* v. *Mutual Benefit Ins. Co.*, 3 N. Y. Sup. 220. The inquiries are presumed to relate to matters which affect the general health and the continuance of life, and not to temporary and occasional ailments. And a disease of well-marked symptoms and alarming character, which is generally regarded as affecting the general health and as threatening the continuance of life, must be disclosed. *Barteau* v. *Phœnix Ins. Co.*, 67 Barb. (N. Y.) 260; S. C., 67 N. Y. (22 Sick.) 595. Where the applicant stated that he was not aware of any disorder or circumstance tending to shorten life, it is not enough that physicians differed about the effect of a sickness which he had had, if he honestly believed his answer to be true. *Jones* v. *Provincial Ins. Co.*, 3 C. B. (N. S.) 65. Where the applicant was required to name the physician usually employed by him, and answered "none," when in truth he had occasionally consulted a physician about a long-standing cough, and had been rejected by the examining physician of another company, the policy was held void for concealment. *Horn* v. *Amicable Ins. Co.*, 64 Barb. (N. Y.) 81. A failure to state facts known to the insurer, or which he ought to have known, or which are rather for his benefit than his injury, is no concealment. If the insurer puts interrogatories on certain points, he thereby raises a presumption that he does not care for information on related points. A general statement, sufficient to put the insurers upon inquiry, if they desire fuller details,

is enough. Where the question put calls only for an expression of opinion, it is enough if it is honestly answered. *Hogle* v. *Guardian Ins. Co.*, 6 Robt. (N. Y.) 567; 4 Abb. (N. S.) 346. An answer may be true and yet not the whole truth, and so be a concealment, as where the insured states that he has been sick one week, when he has been sick a month, or that he has had a physician once, when he has had one several times (*Cazenove* v. *British Equitable Assoc.*, 6 C. B. [N. S.] 437); or, where he states that his employment is of one nature, and he omits to mention another more hazardous occupation in which he is engaged (*Perrins* v. *Mar. Trav. Ins. Co.*, 2 El. & El. 317; *Hartman* v. *Keystone Ins. Co.*, 21 Penn. St. 466); or, where, having more than one medical attendant, he names only one, and that the one least able to give information. *Morrison* v. *Muspralt*, 4 Bing. 60; *Hutton* v. *Waterloo Ass. Soc.*, 1 F. & F. 735; *Monk* v. *Union Ins. Co.*, 6 Robt. (N. Y.) 455. So, if he returns an evasive answer by referring to the surgeon's report, when he is well informed as to all the matters inquired about. *Smith* v. *Ætna Ins. Co.*, 49 N. Y. (4 Sick.) 211. A misstatement or concealment by an agent of the insured is equally as fatal as if made by the insured himself. Where reference is made to any person as a source of information, he is not the agent of the insured, and he is not held responsible for the accuracy of his answers, if the misrepresentations or concealments are without his knowledge or consent. *Wheelton* v. *Hardisty*, 8 El. & Bl. 232; *Rawls* v. *American Ins. Co.*, 36 Barb. (N. Y.) 357; S. C., 27 N. Y. (13 Smith) 282. The materiality of the following matters was submitted to the jury: that the insured was in prison at the stated place of residence (*Huguenin* v. *Rayley*, 6 Taunt. 186); that he had been insane twenty years before (*Mallory* v. *Travelers' Ins. Co.*, 47 N. Y. [2 Sick.] 52; 7 Am. Rep. 410); or that the insured, a single woman, had had a child a year or two before (*Edwards* v. *Barrow*, Ellis on Ins. 116); or statements of his pecuniary situation made to the medical examiner and bearing on the care he was likely to receive. *Hogle* v. *Guardian Ins. Co.*, 4 Abb. Pr. Cas. (N. S.) 346; 6 Rob. 567.

§ 6. **Health, habits, suicide.** As the rate of premium must be fixed by a calculation of the probable length of life, it is necessary that the insurer should be fully informed upon all matters which make the case of the applicant an exceptional one. The standard applications and policies are usually very guarded upon all these points. It is held that a warranty of health, or of good health, simply means that the applicant is in a reasonably good state of health, and such a life as ought to be insured at the common rates. He need not be free from every infirmity. *Peacock* v. *N. Y. Ins. Co.*, 20 N. Y. (6 Smith) 293;

Life Ins. Co. v. *Francisco*, 17 Wall. (U. S.) 672; *Higbee* v. *Guardian Ins. Co.*, 53 N. Y. (8 Sick.) 603. It was no breach that he had received a wound which so affected him that he could not retain his urine or fæces (*Ross* v. *Bradshaw*, 1 Wm. Bl. 312) or that he had violent attacks of the gout. *Willis* v. *Poole*, 2 Parke on Ins. 650. A warranty that the applicant was free from any disease tending to shorten life, was construed to apply only to diseases of a serious nature, and which have a continuing tendency to produce death. Where the disorder was uncertain in its nature, and might proceed either from a defect of the internal organs, or from dyspepsia, it was left to the jury. *Rose* v. *Star Ins. Co.*, 2 Ir. Jur. (O. S.) 206; *Barteau* v. *Phœnix Ins. Co.*, 67 Barb. (N. Y.) 354; 67 N. Y. (22 Sick) 595. Good health means apparent good health, without any known or felt symptoms of sickness (*Hutchinson* v. *Nat. Loan Ass. Soc.*, 7 Ct. Sess. [Sc.] 2d Ser. 467; *Horn* v. *Amicable Ins. Co.*, 64 Barb. [N. Y.] 81) and is for the jury. *Boos* v. *World Ins. Co.*, 64 N. Y. (19 Sick.) 236. That death ensues from some slight indisposition existing at the time of insurance, does not prove that the insured was not in good health. *Watson* v. *Mainwaring*, 4 Taunt. 763; *Eclectic Ins. Co.* v. *Fahrenkrug*, 68 Ill. 468. Predisposition to a disease of such a character, and to such a degree as to seriously affect the health, is inconsistent with good health. *N. Y. Ins. Co.* v. *Flack*, 3 Md. 341. If on full information the insurers would charge beyond the ordinary premium, the life cannot be classed as a healthy one. *Brealey* v. *Collins*, 1 Yon. 317; *Ross* v. *Bradshaw*, 1 Wm. Bl. 312; *Smith* v. *Ætna Ins. Co.*, 49 N. Y. (4 Sick.) 211. Inquiries as to whether the insured has had any serious disease, or disease which would tend to shorten life, relate to matters which even among experts are matters of opinion, and in the case of the insured must be wholly so, and are therefore held only to call for his honest opinion, and if he gives that, it is enough. *Hogle* v. *Guardian Ins. Co.*, 6 Robt. (N. Y.) 567; 4 Abb. (N. S.) 346; *Jones* v. *Provincial Ins. Co.*, 3 C. B. (N. S.) 65. So where the inquiry is whether the applicant has been afflicted with any particular disease or symptom of disease. Where the inquiry is whether the applicant is afflicted with or subject to fits, it means not that he has never had a fit accidentally, but that he is not a person habitually afflicted or liable to fits. *Chattock* v. *Shaw*, 1 Mood. & Rob. 498. So of a question as to gout; the applicant must have had it in some sensible appreciable form so that he knew what it was. *Fowkes* v. *Manchester Ins. Co.*, 3 F. & F. 440. Where the questions related to the spitting of blood, or bronchitis, it was left to the jury whether the symptoms were so recent or severe as to call for mention. (*Campbell* v. *N. E. Ins. Co.*, 98 Mass. 381); but in a clear

case the court may decide it. *Vose* v. *Eagle Ins. Co.*, 6 Cush. (Mass.) 42; *Geach* v. *Ingall*, 14 Mees. & W. 95; *Mutual Benefit Ins. Co.* v. *Miller*, 39 Ind. 475. Where the question was whether the spitting of blood came from the lungs, or the stomach, it was left to the jury. *Fried* v. *Royal Ins. Co.*, 47 Barb. (N. Y.) 127; S. C., 50 N.Y. (5 Sick.) 243. Any concealment with regard to medical attendants, if inquired about, is fatal. *Horn* v. *Amicable Ins. Co.*, 64 Barb. (N. Y.) 81. That the insured was soon after stricken with disease does not prove that he was not in good health when the insurance was effected. *Eclectic Ins. Co.* v. *Fahrenkrug*, 68 Ill. 468. Fainting fits are not epileptic or other fits. *Shilling* v. *Accidental Death Ins. Co.*, 1 F. & F. 116. A disease requiring confinement seems to be one where a physician is necessary. *Cazenove* v. *Brit. Eq. Ass. Co.*, 6 C. B. (N. S.) 437. A warranty that the applicant is of sober and temperate habits, means that he has been a temperate man for a sufficient time to constitute a habit. It is not necessary that his indulgence should be such as to injure his health. It is enough if he is not of habitual sobriety. *Southcombe* v. *Merriman*, 1 Carr. & Marsh, 286. The insurers have a right to know that he has lately had delirium tremens and has been under medical treatment in consequence of excessive drinking. *Hutton* v. *Waterloo Life Ass. Soc.*, 1 F. & F. 735. The use of drugs or spirits to such an amount as to endanger health ought to be disclosed, where the insurers inquire as to his health. *Forbes* v. *Edinburg Ass. Co.*, 10 Ct. Sess. (Sc.) 1st Ser. 451. Addicted to the excessive use of intoxicating liquor, means an habitual excessive use. *Mowry* v. *Home Ins. Co.*, 9 R. I. 346. Habits of intemperance acquired after the completion of the contract, will not avoid the policy unless they are warranted against. *Reichard* v. *Manhattan Ins. Co.*, 31 Mo. 518; *Herton* v. *Equitable Ass. Soc.*, 2 Big. Life & Ac. Reps. 108. A man cannot be said to have been always of temperate habits, who, though usually so, occasionally indulges in debauches, which sometimes bring on delirium tremens. *Mutual Ben. Ins. Co.* v. *Hotterhoff*, 2 Cir. L. C. Rep. (Ohio) 379. But occasional moderate indulgence is not a violation of the warranty. *Swick* v. *Home Ins. Co.*, 1 Ins. L. J. 415; 2 Dill. (U. S.) 160. If a death, "by reason of intemperance," is not covered by the policy, it must appear that intemperance was the proximate cause of death. If it is only a contributing cause, as where it may have, in some degree, affected the power of the insured to resist disease, it is not enough. *Miller* v. *Mut. Benefit Ins. Co.*, 31 Iowa, 216; 7 Am. Rep. 122. If the disease of which the insured died is caused directly by intoxication, as delirium tremens, it does not change the case that it was aggravated by exposure or improper treatment, and

might not otherwise have been fatal. *Ranney* v. *Mut. Benefit Ins. Co.*, U. S. C. C. 1st Cir. 1873. A misrepresentation as to the applicant's age is fatal. *Cazenove* v. *British Eq. Ass. Co.*, 6 C. B. (N. S.) 437; *Murphy* v. *Harris*, Batty (Irish), 206. A party's occupation should be truly stated. *Hartman* v. *Keystone Ins. Co.*, 21 Penn. St. 466; *Perrins* v. *Mar. & Gen. Tr. Ins. Co.*, 2 El. & El. 317. It is common to provide that the insurer shall not be liable where the insured shall die by his own hands, or take his own life. On this provision the question has arisen whether the clause applies where the insured was insane at the time of the act. In *Breasted* v. *Farmers' Loan & Trust Co.*, 4 Hill (N. Y.), 73; S. C., 8 N. Y. 299, it was held that the words in this connection implied a criminal act done with a consciousness of its nature. In *Dean* v. *American Ins. Co.*, 4 Allen (Mass.), 96, it was held that insanity was immaterial and the ordinary sense of the words must be followed, and that a voluntary self-destruction where the party was able to intend the result reached avoided the policy. *Borradaile* v. *Hunter*, 5 Man. & Gr. 639; *Schwabe* v. *Clift*, 2 Car. & K. 134; S. C., 3 Man. & Gr. 437; *Dufaur* v. *Professional Ass. Co.*, 25 Beav. 602; *Nimick* v. *Mut. Benefit Ins. Co.*, 3 Brew. (U. S.) 502; 10 Am. Law Reg. (N. S.) 81; *St. Louis Ins. Co.* v. *Graves*, 6 Bush (Ky.), 268; *White* v. *British Empire Ass. Co.*, 7 L. R. Eq. 394; *Cooper* v. *Mass. Ins. Co.*, 102 Mass. 227; 3 Am. Rep. 451; *Mallory* v. *Travelers Ins. Co.*, 47 N. Y. (2 Sick.) 52; 7 Am. Rep. 410. In *Gay* v. *Union Ins. Co.*, 9 Blatchf. (C. C.) 142, it was held immaterial whether the insured could understand the moral aspects of his act. *Inderry* v. *Life Ins. Co.*, 1 Dill. (C. C.) 403; S. C., 15 Wall. 580. It was held that to render the company liable, the insured must be unable to use a reasonable judgment as to the act. *Eastabrook* v. *Union Ins. Co.*, 54 Me. 224; *Van Zandt* v. *Mut. Benefit Ins. Co.*, 55 N. Y. (10 Sick.) 169; 14 Am. Rep. 215; *Phillips* v. *La. Equitable Ins. Co.*, 26 La. Ann. 404; 21 Am. Rep. 549; *Pierce* v. *Travelers' Ins. Co.*, 34 Wis. 389; *Knickerbocker Ins. Co.* v. *Peters*, 42 Md. 414; *Hathaway* v. *Nat. Ins. Co.*, 48 Vt. 335. In order to avoid this question the insurers have sometimes added the words "sane or insane" and they constitute a valid limitation. *Chapman* v. *Republic Ins. Co.*, 6 Biss. (C. C.) 238; *De Gogorza* v. *Knickerbocker Ins. Co.*, 65 N. Y. (20 Sick.) 232. But in the latter case it was held that these words only made the policy void where the act was intended, and that if there was no intention to take life, the insured did not, in the sense which should be put upon these words, die by his own hand. If the policy contains no provisions of this sort, death by suicide does not avoid it. *Horn* v. *Anglo-Australian Ins. Co.*, 7 Jur.

(N. S.) 673; *Patrick* v. *Excelsior Ins. Co.*, 67 Barb. (N. Y.) 202. It would be against public policy to allow a man to insure himself against death at the hands of justice, or by his own criminal act (*Amicable Ins. Soc.* v. *Bolland*, 2 Dow. & C. 1; S. C., 4 Bligh [N. S.], 194; *Moore* v. *Woolsey*, 4 E. & B. 243), nor could a person claim the benefit of a policy on the life of a person whose death he had caused. *Reed* v. *Royal Exch. Ass. Co.*, Peake's Add. Cas. 10. But in *Hartman* v. *Keystone Ins. Co.*, 21 Penn. St. 466, it was held that suicide was in effect a fraud on the insurer which would bar a recovery. Where there was a provision that the clause against suicide should not affect the interest of any *bona fide* holder for value, it was held not against public policy. *Moore* v. *Woolsey*, 4 E. & B. 243; *White* v. *British Empire Ins. Co.*, 7 L. R. Eq. 394. But an assignee in bankruptcy is not such a *bona fide* holder. *Jackson* v. *Forster*, 1 El. & El. 463. Where the policy is pledged to the insurers, they are *bona fide* holders and it is good so far as to extinguish the debt. *Solicitors' Ass. Co.* v. *Lamb*, 1 Hem. & M. 716; S. C., 2 De Gex, J. & S. 251; *Dufaur* v. *Professional Ass. Co.*, 25 Beav. 599; *Jones* v. *Consolidated Ins. and Ass. Co.*, 26 id. 66. The presumption is against suicide if the circumstances are uncertain. *Mallory* v. *Travelers' Ins. Co.*, 47 N. Y. (2 Sick.) 52; 7 Am. Rep. 410; *Guardian Ins. Co.* v. *Hogan*, 50 Ill. 35. The burden is on the party alleging insanity. *Terry* v. *Life Ins. Co.*, 1 Dill. (C. C.) 403; S. C., 15 Wall. 580; *Knickerbocker Ins. Co.* v. *Peters*, 42 Md. 414; *Phillips* v. *La. Equitable Ins. Co.*, 26 La. Ann. 404; 21 Am. Rep. 549.

§ 7. **Residence. Death by the hand of justice.** Where the residence of the insured is restricted to certain counties, if a license is given to go beyond them for a certain time, the act of God, as by sickness or death, preventing his return within the time, will not excuse him. *Evans* v. *U. S. Ins. Co.*, 64 N. Y. (19 Sick.) 304; *contra*, *Baldwin* v. *N. Y. Ins. Co.*, 3 Bosw. (N. Y.) 530. Where he exceeded the time, and then was taken sick and died, there was no liability of the insurers, whether the delay had any thing to do with his death or not. *Nightingale* v. *State Ins. Co.*, 5 R. I. 38. Where the permit allowed the insured to travel by one route, and he traveled by another, but the change did not affect the risk, the court were divided. *Bevin* v. *Conn. Ins. Co.*, 23 Conn. 244. But see *Hathaway* v. *Trenton Ins. Co.*, 11 Cush. (Mass.) 448 below. A permit indorsed on a policy after its issue will not diminish the rights of the insured under the policy (*Forbes* v. *American Ins. Co.*, 15 Gray [Mass.], 249); but if indorsed before delivery, it will be construed as part of the policy. *Rainsford* v. *Royal Ins. Co.*, 1 Jones & S. (N. Y.) 453; S. C., 52 N. Y. (7 Sick.) 626. If a permit to proceed

to a particular place is written on the receipt for the premium, paid when the policy is taken, it is an independent agreement. It authorizes the insured to go to the place, but not to reside there. Id. The "settled limits" of the United States has reference only to the fixed political boundaries, and not at all to the number of inhabitants. *Casler* v. *Conn. Ins. Co.*, 22 N. Y. (8 Smith) 427. A license or permit will be construed against the company. Thus a permit to reside a year at B covers a residence there in any year during the continuance of the contract. *Notman* v. *Anchor Ass. Co.*, 4 C. B. (N. S.) 476. A permit to go by sea in a first-class vessel covers a passage in the steerage as well as in the cabin. *Taylor* v. *Ætna Ins. Co.*, 13 Gray (Mass.), 434. Where the terms are clear they must be complied with, and going even by a safer route will be a breach. *Hathaway* v. *Trenton Ins. Co.*, 11 Cush. (Mass.) 448. The restriction upon travel or residence will be waived by the receipt of a premium after a known violation of its terms. The knowledge of the agent is that of the principal. *Bevin* v. *Conn. Ins. Co.*, 23 Conn. 244; *Wing* v. *Harvey*, 5 De G., M. & G. 265. Where a breach of the condition has been waived, it is doubtful whether the condition can be again enforced.

It is usually provided that the insurers shall not be liable where the insured meets "death by the hand of justice." This phrase means a death at the hands of the proper officers executing a judicial sentence. *Borradaile* v. *Hunter*, 5 M. & G. 639. It does not cover the case of a rightful killing in any other case, such as that of an accused person who is killed by an officer while attempting an arrest. *Spruill* v. *N. C. Ins. Co.*, 1 Jones' (N. C.) Law, 126. It has been held that such an exception is unnecessary, as it is against public policy to allow insurance against the consequences of a capital felony. *Amicable Ins. Soc.* v. *Ballard*, 2 Dow & C. 1; S. C., 4 Bligh (N. S.), 194. But this reasoning would seem doubtful, especially where the insurance was for the benefit of some third person. A cognate exception is that of "death in the known violation of law." This language is broader, and its meaning is not fully settled. Where the insured, after having provoked a quarrel, retreated and attempted to escape, but was shot by his adversary, it was held not to be within this clause. *Harper* v. *Phœnix Ins. Co.*, 18 Mo. 109; *Overton* v. *St. Louis Ins. Co.*, 39 Mo. 122. Where the insured was engaged in a criminal violation of law, known by him to be so, and if such violation of law might have reasonably been expected to expose him to violence, which might endanger life, the case was within the exception. *Cluff* v. *Mutual Benefit Ins. Co.*, 13 Allen (Mass.), 308; S. C., 99 Mass. 317; *Bradley* v. *Mutual Benefit Ins. Co.*, 3 Lans. (N. Y.) 341; S. C., 45 N. Y. (6 Hand) 422.

Death by suicide does not come within this provision. *Patrick* v. *Excelsior Ins. Co.*, 67 Barb. (N. Y.) 202. Where the insured was killed while trotting horses for money, which was a misdemeanor, there can be no recovery. *Ins. Co.* v. *Seaver*, 19 Wall. (U. S.) 531. So where she died in consequence of a criminal operation for an abortion. *Hatch* v. *Mutual Life Ins. Co.*, 120 Mass. 634; 21 Am. Rep. 541. But where a man was killed by the husband of a woman with whom he had just committed adultery, it did not prevent a recovery. *Goetzmann* v. *Conn. Ins. Co.*, 3 Hun (N. Y.), 515; 5 N. Y. Sup. (T. & C.) 572. Unless there is proof to the contrary, the criminal laws of other countries will be presumed to be the same as those of the State having jurisdiction. *Bradley* v. *Mutual Benefit Ins. Co.*, 45 N. Y. (6 Hand) 422; 6 Am. Rep. 115. If there is no such exception, a policy covers a death by violence. *Spruill* v. *N. C. Ins. Co.*, 1 Jones' (N. C.) L. 126. Of somewhat the same character is a common exception against engaging in military service. A death from the acts of thieves or banditti during the disturbed state of affairs resulting from insurrection is not a casualty or consequence of war or rebellion, nor a death from belligerent forces. The incidental service of bridge-building is not military service. *Welts* v. *Conn. Ins. Co.*, 46 Barb. (N. Y.) 412; S. C., 48 N. Y. (3 Sick.) 34; 8 Am. Rep. 518. If the insured connected himself in any form with the belligerent force, whether he held a commission or not, he enters the military service. *Mitchell* v. *Mutual Ins. Co.*, Bliss on Ins. 643. It makes no difference that the service was not voluntary. *Dillard* v. *Manhattan Ins. Co.*, 44 Ga. 119; 9 Am. Rep. 167.

§ 8. **Payment of premium.** Where it is provided that the policy shall not take effect until the premium is paid, there is no contract until payment. *Schwartz* v. *Germania Ins. Co.*, 18 Minn. 448. But this clause may be waived by a delivery of the policy without insisting on payment. *Washoe Man. Co.* v. *Hibernia Ins. Co.*, 14 N. Y. Sup. (7 Hun) 74; S. C., 66 N. Y. (21 Sick.) 613; *Miller* v. *Brooklyn Ins. Co.*, 12 Wall. (U. S.) 285. Where the policy acknowledges the receipt of the premium, it cannot be denied for the purpose of defeating the contract. *Basch* v. *Humboldt Ins. Co.*, 35 N. J. 429; *Teutonia Ins Co.* v. *Mueller*, 77 Ill. 22. Credit may be given. *Ins. Co.* v. *Colt*, 20 Wall. (U. S.) 560; *Miss. Valley Ins. Co.* v. *Dunklee*, 16 Kans. 158. Where the policy is forfeited if the premium or any note given for it is unpaid, a failure to pay the note terminates it, and the insurer is not bound to give notice of the time of its maturity, nor to demand it. *Pitt* v. *Berkshire Ins. Co.*, 100 Mass. 500; *Catoir* v. *American Ins. Co.*, 33 N. J. 487; *Baker* v. *Union Ins. Co.*, 43 N. Y. (4 Hand) 283; *Rochner* v. *Knickerbocker Ins. Co.*, 63 N. Y. (17 Sick.) 160. In such case it would

probably excuse the insured if, either by statute, or by the contract, the insurer was bound to give the insured notice of the maturity of the notes, or the time when the premium was due. Where the policy provides that it shall be forfeited if the premiums are unpaid, but contains no provision that a failure to pay the notes shall have that effect, it will not be construed to require their payment to avoid a forfeiture. *McAllister* v. *N. E. Ins. Co.*, 101 Mass. 558; 3 Am. Rep. 404; *N. E. Ins. Co.* v. *Hasbrook*, 32 Ind. 447. If there is no provision in the contract making the payment of the premium a condition precedent, it is merely a debt, and its non-payment does not affect the policy. *Woodfin* v. *Asheville Ins. Co.*, 6 Jones (N. C.), 558. The insurer has a right to insist upon payment in legal tender, but this right he may waive, and it is a question of evidence whether he has waived it. Any thing actually accepted, without reserving any objection, is good. The right of waiver rests with the agent, unless he is expressly deprived of it by the principal. *Robinson* v. *Int. Ass. Soc.*, 42 N. Y. (3 Hand) 54; *N. Y. Ins. Co.* v. *Clopton*, 7 Bush (Ky.), 179; 3 Am. Rep. 290. Such an agent cannot accept any thing but money. *Hoffman* v. *Hancock Ins. Co.*, 92 U. S. (2 Otto), 161. If the insurers agree to take payment in other things, as advertising, or board, they must call for enough to pay the premium. *Kentucky Ins. Co.* v. *Jenks*, 5 Ind. 96; *Schwartz* v. *Germania Ins. Co.*, 18 Minn. 448. A note, if so given and accepted, will be payment. *Pitt* v. *Berkshire Ins. Co.*, 100 Mass. 500. Such payment may be accepted conditionally. Thus, the note may provide that the policy shall be void if the note is not paid. *Wall* v. *Home Ins. Co.*, 36 N. Y. (9 Tiff.) 157; *Pitt* v. *Berkshire Ins. Co.*, 100 Mass. 500; *Patch* v. *Phœnix Ins. Co.*, 44 Vt. 481; *Ferebee* v. *N. C. Ins. Co.*, 68 N. C. 11. A verbal agreement to give indulgence, made before the issue of the policy, cannot be proved (*Howell* v. *Knickerbocker Ins. Co.*, 44 N. Y. [5 Hand] 276; 4 Am. Rep. 675; *Coombs* v. *Charter Oak Ins. Co.*, 65 Me. 382); nor a custom to receive overdue premiums. *Franklin Ins. Co.* v. *Sefton*, 53 Ind. 380; *contra*, *Helme* v. *Phila. Ins. Co.*, 61 Penn. St. 107. It has been doubted whether an agent, or even an officer, can himself assume the payment to the insurer (*Buffum* v. *Fayette Ins. Co.*, 3 Allen [Mass.], 360; *Ferebee* v. *N. C. Home Ins. Co.*, 68 N. C. 11); but in *Chickering* v. *Globe Ins. Co.*, 116 Mass. 321, it was held to be a good payment. *Prince of Wales Ass. Co.* v. *Harding*, El. Bl. & El. 183. Where the day for payment falls on Sunday it is payable on Monday. *Campbell* v. *Int. Ins. Co.*, 4 Bosw. (N. Y.) 298; *Howland* v. *Cent. Ins. Co.*, 121 Mass. 499. A state of war between the countries of the respective parties excuses the non-payment of a premium. *Sands* v. *N. Y. Ins. Co.*, 59 Barb. (N. Y.

557; S. C., 50 N. Y. (5 Sick.) 626. Sudden sickness of the insured does not excuse non-payment (*Howell* v. *Knickerbocker Ins. Co.*, 44 N.Y. [5 Hand] 277; 4 Am. Rep. 675); nor that the policy lapsed by accident, the insured not having received the usual notice. *Windus* v. *Tredegar*, 15 L. T. (N. S.) 108. Where the insurers have for years sent notice of the amount due, they cannot terminate this practice without notice. *Meyer* v. *Knickerbocker Ins. Co.*, 51 How. (N. Y.) Pr. 263. The insurer's practice and course of dealing may be such as to induce belief that time will be allowed, and then they will be estopped to deny it. *Chicago Ins. Co.* v. *Warner*, 80 Ill. 410. A provision that the premium may be paid within twenty days after the day on which it is due, has been held not to extend the policy so that a death within that period would be within its terms. *Simpson* v. *Accidental Death Ins. Co.*, 2 C. B. (N. S.) 257; *Mut. Benefit Ins. Co.* v. *Ruse*, 8 Ga. 534; *Ruse* v. *Mut. Benefit Ins. Co.*, 23 N. Y. (9 Smith) 516. If the insurers are insolvent, the insured need not pay, and will not lose his remedy against their property by not paying. *Re Albert Ins. Co.*, L. R., 9 Eq. 703. The payment of the premium may be waived by any act of the insurers or their agent upon which the insured has a right to rely, which manifests their intention not to exact a literal performance. *Chicago Ins. Co.* v. *Warner*, 80 Ill. 410. Any other doctrine would countenance fraud. *Sheldon* v. *Conn. Ins. Co.*, 25 Conn. 207. Thus where the insured offered to pay, or offered his check, which was then good, but the agent said it would make no difference, or told him to let it lie, it was a waiver. *Bouton* v. *American Ins. Co.*, 25 Conn. 542; *N. Y. Central Ins. Co.* v. *Nat. Prot. Ins. Co.*, 20 Barb. (N. Y.) 469. The delivery of the policy without exacting payment raises a presumption of waiver. *Miller* v. *Brooklyn Ins. Co.*, 12 Wall. (U. S.) 285; *Washoe Man. Co.* v. *Hibernia Ins. Co.*, 14 N. Y. Sup. (7 Hun) 74; 66 N. Y. (21 Sick.) 613. The receipt of part after forfeiture is a waiver. *Sims* v. *State Ins. Co.*, 47 Mo. 54; 4 Am. Rep. 311; *Hodsdon* v. *Guardian Ins. Co.*, 97 Mass. 144; *contra*, *Garlick* v. *Miss. Valley Ins. Co.*, 44 Iowa, 553. Even if the policy provides that the acceptance of part is only an act of courtesy, a known practice to receive the premiums after the day will be a waiver. *Thompson* v. *St. Louis Ins. Co.*, 52 Mo. 469; *Chicago Life Ins. Co.* v. *Warner*, 80 Ill. 410. A practice to receive premiums after they are due, and statements that all policies are nonforfeitable, will prevent the insurer from taking advantage of a forfeiture. *Home Life Ins. Co.* v. *Pierce*, 75 Ill. 426. They cannot change their practice, and insist on a more rigorous compliance with the literal terms of the contract, without notice. *Meyer* v. *Knickerbocker Ins. Co.*, 51 How. (N. Y.) Pr. 263. A demand of payment after the day is not

a waiver. *Edge* v. *Duke*, 18 L. J. Ch. 183. The policy may be only suspended by non-payment. *Jolliffe* v. *Madison Ins. Co.*, 39 Wis. 111; 20 Am. Rep. 35. A payment and receipt of an overdue premium in ignorance of the death of the insured will not keep alive the policy. *Pritchard* v. *Merchants' Ass. Soc.*, 3 C. B. (N. S.) 622. Where an agent insured his own life, and a receipt for the premium was found among his papers, but not countersigned by him as required by its terms, it was *prima facie* evidence of payment. *Norton* v. *Phœnix Ins Co.*, 36 Conn. 503; 4 Am. Rep. 98; *Myers* v. *Keystone Ins. Co.*, 27 Penn. St. 268. But see *Badger* v. *American Pop. Ins. Co.*, 103 Mass. 244, 4 Am. Rep. 547. An absolute extension of the terms of payment will not be construed as conditional on the continued life of the insured. *Homer* v. *Guardian Ins. Co.*, 67 N. Y. (22 Sick.) 478. Payment of part of the yearly premium will not keep the policy alive for part of a year. *Hudson* v. *Knickerbocker Ins. Co.*, 28 N. J. Eq. 167.

§ 9. **Construction of the policy.** The subject of this section has already been treated generally. Title I, Art. 2, § 3. There are no different principles to be applied in the construction of policies of insurance from those which guide the interpretation of other contracts. *Aurora Ins. Co.* v. *Eddy*, 49 Ill. 106. The object is to reach the intention of the parties in entering into the contract, and also to furnish a rule by which those who hereafter contract in the same terms may know to what they are binding themselves. In the first place, the sources to which the court may look for evidence of the parties' intentions are the same as in other contracts. The written words in which they have stated the agreement cannot be altered, modified or contradicted by parol agreements of the same or earlier date. But the courts, in order that they may understand the words used, will to a certain degree, hear evidence as to the subject-matter of the contract, and the situation of the parties. This they do in order that they may place themselves in the situation of the parties and look at the matter from their standpoint. Thus, where the terms are ambiguous, and the meaning doubtful, evidence of usage may come in to explain the policy. May on Ins., § 173; *Winthrop* v. *Union Ins. Co.*, 2 Wash. C. C. 7. But such evidence can never be admitted to control clear and definite provisions of the contract. A technically untrue description may be sustained by proof that the words are correct according to usage. *Fowler* v. *Ætna Ins. Co.*, 7 Wend. (N. Y.) 270. Insurers may sometimes estop themselves from insisting upon a condition of the policy by a uniform usage of their own to disregard it. *Helme* v. *Philadelphia Ins. Co.*, 61 Penn. St. 107; *Thompson* v. *St. Louis Ins. Co.*, 52 Mo. 469; *Buckbee* v. *U. S. Ins. Co.*, 18 Barb.

(N. Y.) 541. All the papers are to be considered together. *Fowkes* v. *Manchester Life Ass.*, 3 B. & S. 917; *Washington Ins. Co.* v. *Haney*, 10 Kans. 525. Where the truth of statements in the application is made a condition precedent, the fact that a part of them only are recited in the policy will not affect the condition. *Sceales* v. *Scanlan*, 6 Irish (Law), 367. An insurance against death by "violent or accidental means," is not enlarged by conditions setting forth certain accidental deaths which the policy does not cover. *Southard* v. *Railway Passengers' Ass. Co.*, 34 Conn. 574. Language, which is fixed by the insurers, and is for their benefit, will be construed against them. *Ins. Co.* v. *Wright*, 1 Wall. (U. S.) 456; *Foot* v. *Ætna Ins. Co.*, 61 N. Y. (16 Sick.) 571. Thus, where the particular statements of the proposal are affirmed to be correct throughout, and it is stipulated that if it shall hereafter appear that any fraudulent concealment or designedly untrue statement is made, the policy shall be void, the latter clause limits the former, and the statements must be not only not correct, but knowingly so, to avoid the policy. *Fowkes* v. *Manchester Life Ass.*, 3 B. & S. 917. The courts incline to any construction which will avoid forfeitures, and as far as possible construe conditions as subsequent, rather than precedent. *Helme* v. *Philadelphia Ins. Co.*, 61 Penn. St. 107. Thus, where the policy provides that the non-payment of a premium shall make void the policy, but does not distinctly provide that the non-payment of a note given for a premium shall have that effect, it will be construed as not terminating the policy. *McAllister* v. *N. E. Ins. Co.*, 101 Mass. 558; 3 Am. Rep. 404; *N. E. Ins. Co.* v. *Hasbrook*, 32 Ind. 447; *Hummel's Appeal*, 78 Penn. St. 320. Where the note given for the premium provided that the policy should be void if it was not paid at maturity, the court held the policy voidable only, and that the election to terminnate it must be seasonably exercised, or it was lost. *Mutual Benefit Ins. Co.* v. *French*, 2 Cinn. Super. Ct. Rep. 321. Of course, in such a case, an attempt to collect the note would be an election not to insist on the forfeiture.

§ 10. **Beneficiaries. Assignment.** Life insurance policies may be and often are made payable to some person who has an interest in the life of the insured, as, for instance, to his wife, or children, who then become vested with the entire beneficial interest, in the insurance. *Ruppert* v. *Union Ins. Co.*, 7 Robt. (N. Y.) 155; *Chapin* v. *Fellowes*, 36 Conn. 132; 4 Am. Rep. 49; *Fraternal Ins. Co.* v. *Applegate*, 7 Ohio St. 292; *Gould* v. *Emerson*, 99 Mass. 154. In such case, the sum insured is held in trust for the beneficiaries, although suit would not be brought in their names. *Burroughs* v. *State Ins. Co.*, 97 Mass. 359; *Bailey* v. *N. E. Ins. Co.*, 114 id. 177; 19 Am. Rep. 329.

Where a policy on the life of the wife was payable to her husband and children, and she survived him and there were no children, the insurance money went to her estate. *Keller* v. *Gaylor*, 40 Conn. 343. The insured in such cases, or even the beneficiary, is in many States forbidden to assign. *Eadie* v. *Slimmon*, 26 N. Y. (11 Smith) 9; *Connecticut Ins. Co.* v. *Burroughs*, 34 Conn. 305; *Knickerbocker Ins. Co.* v. *Weitz*, 99 Mass. 157. But the assignee was reimbursed the premiums which he had paid. *Chapin* v. *Fellowes*, 36 Conn. 132; 4 Am. Rep. 49. In States where an assignment is not forbidden, it will be enforced. *Kerman* v. *Howard*, 23 Wis. 108; *Pomeroy* v. *Manhattan Ins. Co.*, 40 Ill. 398; *Charter Oak Ins. Co.* v. *Brant*, 47 Mo. 419; 4 Am. Rep. 328; *Rison* v. *Wilkerson*, 3 Sneed (Tenn.), 565; *De Ronge* v. *Elliott*, 23 N. J. Eq. 486. But where the policy was payable to the wife or children, her assignment is defeated by her death before her husband dies. *Connecticut Ins. Co.* v. *Burroughs*, 34 Conn. 305. Where the policy was payable to the wife, who died leaving the insured, he was allowed to change the beneficiary. *Gambs* v. *Covenant Ins. Co.*, 50 Mo. 44; *Kerman* v. *Howard*, 23 Wis. 108; *Mut. Ben. Ins. Co.* v. *Atwood*, 24 Gratt. (Va.) 497; 18 Am. Rep. 652. The insured is not allowed, while there is a beneficiary living, to surrender it and take a new policy to himself, or otherwise divert the proceeds. *Ruppert* v. *Union Ins Co.*, 7 Robt. (N. Y.) 155; *Chapin* v. *Fellowes*, 36 Conn. 132; 4 Am. Rep. 49; *Fraternal Ins. Co.* v. *Applegate*, 7 Ohio St. 292; *Gould* v. *Emerson*, 99 Mass. 154. If the policy is made payable to the wife or children, without their knowledge, they may afterward ratify the act and claim the benefit. *Thompson* v. *American Ins. Co.*, 46 N. Y. (1 Sick.) 675.

TITLE III.

ACCIDENT INSURANCE.

ARTICLE I.

OF ACCIDENT INSURANCE.

Section 1. In general. Injury to the person, whether finally resulting in death or not, which causes loss of time or profit, or suffering alone, is a proper subject of insurance. Death by accident is defined to be death from any unexpected event which happens, as by chance, or which does not take place according to the usual course of things. *North American Ins. Co.* v. *Burroughs*, 69 Penn. St. 43; 8 Am. Rep. 212.

Such is an injury caused by the slipping of a pitchfork which struck the holder in the bowels. So a strain in lifting is an injury caused by accident, occasioned by external or material causes. *Martin* v. *Travelers' Ins. Co.*, 1 F. & F. 505. But a rupture caused by jumping from the cars and running, was held not to be an injury by violent or accidental means. *Southard* v. *Railway Passengers Ass. Co.*, 34 Conn. 574. Where a person is drowned while bathing, it is an accidental death, although no proof is offered of the circumstances. *Trew* v. *Railway Passengers' Ass. Co.*, 5 Hurlst. & N. 211. Where the deceased was found in a creek under a railroad with a cut in his head, it was left to the jury to say whether the death was by accident. The policy provided for compensation for injury and a gross sum of insurance against death. It provided also that no claim for injury should be made except where caused by outward and visible means. *Mallory* v. *Travelers' Ins. Co.*, 47 N. Y. (2 Sick.) 52; 7 Am. Rep. 410; *Trew* v. *Railway Pass. Ass. Co.*, 6 H. & N. 839. Where any disease arising within the system, whether directly or in combination with accident causing death, was excepted from the policy, a death following an operation from strangulated hernia caused by an accident was covered. *Fitton* v. *Accidental Death Ins. Co.*, 17 C. B. (N. S.) 122. Where under the same provision except that "secondary" was inserted before "cause" and the death was caused by erysipelas following an accident after an interval, the insurers were not held. *Smith* v. *Accident Ins. Co.*, L. R., 5 Ex. 302; 22 L. T. 861. Where the insured fell in a fit in shallow water and was drowned, it was held to be a death by external and material causes. *Reynolds* v. *Accidental Ins. Co.*, 22 L. T. (N. S.) 820. A sprain in lifting is an injury by external and material causes. *Martin* v. *Travelers' Ins. Co.*, 1 F. & F. 505. A death by sunstroke was held not to be a death by accident (*Sinclair* v. *Maritime Passengers' Ass. Co.*, 3 Ell. & Ell. 478; but where a man is waylaid and killed by robbers, his death comes within those terms. *Ripley* v. *Railway Passengers' Ins. Co.*, 16 Wall. (U. S.) 336. A railway accident does not depend upon any accident to the road or machinery, but includes any accident occurring in the course of travel and arising out of the fact of the journey (*Theobald* v. *Railway Passengers' Ass. Co.*, 10 Exch. 44), and includes an injury caused by a passenger's slipping from the car step in alighting at the end of his journey. Id. Where the insurance is against injury, total disability is held to mean inability of the insured to follow his usual occupation and business in the usual way. *Sawyer* v. *U. S. Casualty Co.*, 8 Law Reg. (N. S.) 233 (Mass.). In *Hooper* v. *Accidental Death Ins. Co.*, 5 H. & N. 545; S.C., 6 id. 839, it was held that a sprain of the ankle which

compelled confinement to the house, caused total disability within the meaning of the policy, and it was said that wholly disabled is equivalent to quite disabled and does not mean unable to do any part of his business. *Rhodes* v. *Railway Pass. Ass. Co.*, 5 Lans. (N. Y.) 71. Where the insured crosses from a steamboat to the cars on foot, he is still protected by a policy against accident while traveling in a conveyance. *Northrup* v. *Railway Passengers' Ins. Co.*, 43 N. Y. (4 Hand) 516; 3 Am. Rep. 724. Under a like policy an accident after the assured had alighted from the train at his destination was covered. *Tooley* v. *Railway Pass. Ins. Co.*, 3 Biss. (C. C.) 399; *Champlin* v. *Railway Pass. Ass. Co.*, 6 Lans. (N. Y.) 71. So an engineer is protected though he actually is running the train. *Brown* v. *Railway Pass. Ass. Co.*, 45 Mo. 221. Where the assured had landed from a steamboat and had started to go several miles to his home on foot, he is not protected. *Ripley* v. *Railway Pass. Ass. Co.*, 1 Dill. (C. C.) 403; S. C., 16 Wall. 336. Where the injury is caused by the negligence or willful exposure of the insured, it was held not to be an accidental injury. *Morel* v. *Mississippi Valley Ins. Co.*, 4 Bush (Ky.), 535. If it is provided that the insurer shall not be liable for willful exposure, ordinary negligence will not defeat a recovery. *Schneider* v. *Provident Ins. Co.*, 24 Wis. 28. But it would seem that mere negligence is not enough to bar a recovery here more than in other cases of insurance, but is rather one of the risks intended to be insured against. May on Ins., § 530; *Provident Ins. Co.* v. *Martin*, 32 Md. 310. Where the policy provided that the insured shall use all due diligence for his personal safety, the question whether he had done so was submitted to the jury. *Stone* v. *U. S. Casualty Co.*, 34 N. J. 371. A change of occupation on the part of the insured means the engaging in another employment as a usual business and something more than a casual change when unoccupied. Thus a teacher may superintend the erection of a building for himself (*Stone* v. *U. S. Casualty Co.*, 34 N. J. 371), or a man not a farmer may help get in hay (*North American Ins. Co.* v. *Burroughs*, 69 Penn. St. 43; 8 Am. Rep. 212); without forfeiting their insurance. A statement of occupation in the application is not a warranty that the insured will continue in that occupation. He may change from a switchman to a brakeman. *Provident Ins. Co.* v. *Fennell*, 49 Ill. 180. A provision against any employment or any exposure more hazardous than that in which the insured was then engaged, was construed as referring only to hazardous employments and not to hazardous individual acts. *Stone* v. *U. S. Casualty Co.*, 34 N. J. 371. Every one has an insurable interest in his own life and in his personal safety. *Provident Ins. Co.* v. *Baum*, 29 Ind. 236. Where the policy insures

against death following within ninety days from injury, and also provides compensation at a certain rate per week, where not fatal, the clauses are alternate and a recovery can be had either under one or the other. *Perry* v. *Provident Ins. Co.*, 103 Mass. 242. The ninety days include the day of the accident. If the death occurs within that time though after the policy has expired, it is within the policy. Id. Where the policy provides for a fixed sum in case of death and a proportionate sum in case of injury, the sum is not estimated by the proportion of the injury to the amount payable in case of death. The insured may recover for expense and suffering, but not for loss of time or of profits. *Theobald* v. *Passengers' Ass. Co.*, 10 Exch. 45. The rules which govern the proofs in other cases of insurance also control here. "Sufficient proof of injury" does not require a statement of the cause or manner of the injury. *North American Ins. Co.* v. *Burroughs*, 69 Penn. St. 43; 8 Am. Rep. 212; *Railway Pass. Ass. Co.* v. *Burwell*, 44 Ind. 460. A condition that the particulars of the accident must be furnished is a condition precedent and must be complied with, and the failure to do so is not excused even by sudden death. *Gamble* v. *Accident Ass. Co.*, Ir. R. 4 C. L. 204. Notice of the death as soon as possible means within a reasonable time. *Provident Ins. Co.* v. *Baum*, 29 Ind. 236.

Where the policy requires that as soon as the accident happens a surgeon shall be called, it is held in France that a failure to do so, unless negligent, will not bar a recovery. *Decheance* v. *La Sécurité Générale*, *Dalloz Jur. de Roy.* 1870, pt. 3, 63. The contract may be by parol, or it may be a contract to issue a policy which equity will enforce. *Rhodes* v. *Railway Passengers' Ass. Co.*, 5 Lans. (N. Y.) 71. The contract being often made hastily is evidenced by tickets issued to the insured. Their sale and delivery by any one to whom the insurer has committed them makes a contract. *Brown* v. *Railway Pass. Ass. Co.*, 45 Mo. 221.

TITLE IV.

MUTUAL INSURANCE.

ARTICLE I.

OF MUTUAL INSURANCE.

Section 1. In general. In mutual insurance, each person insured becomes a member of the corporation, has a share in the management of the affairs and a share in the profits and losses of the business. It

is equally a mutual company where a right is given to pay in a gross premium in cash with no further participation in losses or profits, the premium going into the general fund. *Mygatt* v. *N. Y. Prot. Ins. Co.*, 21 N. Y. (7 Smith) 52; *Ohio Ins. Co.* v. *Marietta Woolen Factory*, 3 Ohio St. 348; *Union Ins. Co.* v. *Hoge*, 21 How. (U. S.) 35; *contra*, *Hart* v. *Achilles*, 28 Barb. (N. Y.) 577; *Illinois Ins. Co.* v *Stanton*, 57 Ill. 354. Usually, the fund to which the members look for security that their losses will be paid, consists of cash received from cash premiums, premium notes which are next liable to be called upon to supply a deficiency in cash, and beyond these, a liability of the members to some amount fixed by statute or charter. Sometimes notes are given, called stock notes, expressly made payable by installments from time to time. These are payable absolutely without regard to the question of loss, are negotiable, and barred by the statute of limitations. *Dana* v. *Munro*, 38 Barb. (N. Y.) 528; *Savage* v. *Medbury*, 19 N. Y. (5 Smith) 32; *Brookman* v. *Metcalf*, 32 N. Y. (5 Tiff.) 591. But ordinary premium or deposit notes are only payable as an assessment is laid; are not negotiable since they are payable on a contingency, and are only barred so far as they become due by assessment. *Savage* v. *Medbury*, 19 N. Y. (5 Smith) 32; *Howland* v. *Edmonds*, 24 N. Y. (10 Smith) 307; *Hope Ins. Co.* v. *Weed*, 28 Conn. 51; *Howland* v. *Cuykendall*, 40 Barb. (N. Y.) 320. A premium note, though absolute in its form, cannot be treated as an absolute note by any one who has notice of its real nature. *Bell* v. *Shibley*, 33 Barb. (N. Y.) 610; *McIntire* v. *Preston*, 5 Gilm. (Ill.) 48. A note given in advance for premiums to be earned, and by the charter. only collectible so far as the premium is earned, is a premium note *Elwell* v. *Crocker*, 4 Bosw. (N. Y.) 22. A note, in form a premium note, may be shown to have been given as a stock note. *Sands* v. *St. John*, 36 Barb. (N. Y.) 628. Where the contract is completed, the insured becomes a member and is bound by the rules and by-laws of the company. *Mitchell* v. *Lycoming Ins. Co.*, 51 Penn. St. 402; *Coles* v. *Iowa State Ins. Co.*, 18 Iowa, 426. The records of the company become evidence for or against him. *Diehl* v. *Adams County Ins. Co.*, 58 Penn. St. 443. The acts of its officers, within their authority, bind him. *Hackney* v. *Alleghany County Ins. Co.*, 4 Penn. St. 185. He cannot dispute the regularity of its existence. *Sands* v. *Hill*, 42 Barb. (N. Y.) 651; *Traders' Ins. Co.* v. *Stone*, 9 Allen (Mass.), 483; *Currie* v. *Mut. Ass. Soc.*, 4 H. & M. (Va.) 315. He cannot deny its acceptance of an amendment of its charter, for the purpose of disputing his note given under such amendment. *Fell* v. *McHenry*, 42 Penn. St. 41. He cannot set up a want of insurable interest as a de-

fense against assessments, for he cannot repudiate the contract when the company is in no fault. *N. E. Ins. Co.* v. *Belknap*, 9 Cush. (Mass.) 140; *Cummings* v. *Sawyer*, 117 Mass. 30. He is not bound by by-laws or other acts of the company, which affect his contract, done without his consent, still more if in violation of the charter. *N. E. Ins. Co.* v. *Butler*, 34 Me. 451; *Hamilton Ins. Co.* v. *Hobart*, 2 Gray (Mass.), 543; *Ins. Co.* v. *Connor*, 17 Penn. St. 136; *Great Falls Ins. Co.* v. *Harvey*, 45 N. H. 292. It is not enough to free the member from his liability that the insured has violated some provision of his policy, and that the insurers have the right to declare it void. *Iowa State Ins. Co.* v. *Prossee*, 11 Iowa, 115; *Com.* v. *Union Ins. Co.*, 112 Mass. 116. The insured is also liable for the full term, although there may have been a total loss which has been paid, so that the insurers owe him no further duty. *N. H. Ins. Co.* v. *Rand*, 24 N. H. 428; *Boot and Shoe Ins. Co.* v. *Melrose Soc.*, 117 Mass. 199. Of course only members are liable to an assessment, and the assignee of a policy even after the company have assented to the assignment is not a member till he has agreed to assume the liability of one. *Com.* v. *Union Ins. Co.*, 112 Mass. 116; *Philbrook* v. *N. E. Ins. Co.*, 37 Me. 137; *Boynton* v. *Clinton Ins. Co.*, 16 Barb. (N. Y.) 254. Though the policy provides that the insurer shall continue a member only so long as he is insured; yet if it also provides that he shall not be released from his note till he has paid his part of all losses before his surrender, he will continue liable for subsequent losses till he has fully complied with the latter provision. *Hyatt* v. *Wait*, 37 Barb. (N. Y.) 29; *Atlantic Ins. Co.* v. *Goodall*, 35 N. H. 328; *contra*, *Wilson* v. *Trumbull County Ins. Co.*, 19 Penn. St. 372. An assessment made after a known forfeiture, for a loss occurring after, may be a waiver of the forfeiture. *Sands* v. *Hill*, 42 Barb. (N. Y.) 651; *Ins. Co.* v. *Slockbower*, 26 Penn. St. 199; *Tuttle* v. *Robinson*, 33 N. H. 104; *contra*, *Philbrook* v. *N. E. Ins. Co.*, 37 Me. 137. But the insured need not accept the waiver and may elect to insist on the forfeiture so far as it gives him any defense against the assessment. *Tuckerman* v. *Bigler*, 46 Barb. (N. Y.) 375; *Wilson* v. *Trumbull County Ins. Co.*, 19 Penn. St. 372. If the assessment is made for a loss which occurred before the forfeiture or without knowledge of it, it is no waiver. *Viall* v. *Genesee Ins. Co.*, 19 Barb. (N. Y.) 440; *Allen* v. *Vermont Ins. Co.*, 12 Vt. 366; *Finley* v. *Lycoming Ins. Co.*, 30 Penn. St. 311. When a loss has been successfully resisted for a forfeiture of the policy by taking other insurance, the premium note is also made void. *Tuckerman* v. *Bigler*, 46 Barb. (N. Y.) 375. If the policy never was in force because certain preliminary conditions

precedent were never complied with, the premium note is never in force. *Haverhill Ins. Co.* v. *Prescott*, 42 N. H. 547; *Lynn* v. *Burgoyne*, 13 B. Monr. (Ky.) 400. A cancellation and surrender of the policy and premium note dissolves the membership, and is equivalent to an adjustment of all claims, so that it entirely discharges the insured from further liability of any kind. *Wadsworth* v. *Davis*, 13 Ohio St. 123; *Campbell* v. *Adams*, 38 Barb. (N. Y.) 132; *York County Ins. Co.* v. *Turner*, 53 Me. 225. The insolvency of the insured and his discharge terminates all liability to him as well as by him. *Reynold* v. *Mut. Ins. Co.*, 34 Md. 280; 6 Am. Rep. 337; *Gardiner* v. *Piscataquis Ins. Co.*, 38 Me. 439; *Jackson* v. *Mass. Ins. Co.*, 23 Pick. (Mass.) 418; *Wilson* v. *Trumbull Ins. Co.*, 19 Penn. St. 372. But other cases hold that in such cases the policy is only voidable and not void. *Huntley* v. *Perry*, 38 Barb. (N.Y.) 571. It has also been held that neither a surrender nor a cancellation of the policy, nor the insolvency of the company ends the liability to assessment. *Com.* v. *Union Ins. Co.*, 112 Mass. 116; *St. Louis Ins. Co.* v. *Boeckler*, 19 Mo. 135; *Sterling* v. *Mer. Ins. Co.*, 32 Penn. St. 75; *Alliance Ins. Co.* v. *Swift*, 10 Cush. (Mass.) 433. It would seem to be a question of intent on all the evidence. An unexecuted agreement to cancel is no defense. *Columbia Ins. Co.* v. *Stone*, 3 Allen (Mass.), 385. Where the liability of the insurers is suspended, either by the charter or a special vote, during the time an assessment remains due and unpaid, this does not release the insurer from the obligation to pay his share of losses occurring in the meantime. *Coles* v. *Iowa State Ins. Co.*, 18 Iowa, 425; *Nash* v. *Union Ins. Co.*, 43 Me. 343. In order to make an assessment a valid claim against the insurer, all the provisions of the charter must be complied with. *Atlantic Ins. Co.* v. *Fitzpatrick*, 2 Gray (Mass.), 279. There must be such a state of affairs as to authorize an assessment, or a vote to assess will have no validity. The premium note is a conditional promise to pay upon the happening of certain contingencies, and the existence of the conditions must be established affirmatively by the person who attempts to collect the note. *Pacific Ins. Co.* v. *Guse*, 49 Mo. 329; 8 Am. Rep. 132; *Long Pond Ins. Co.* v. *Houghton*, 6 Gray (Mass.), 77; *Thomas* v. *Whallon*, 31 Barb. (N. Y.) 172; *American Ins. Co.* v. *Schmidt*, 19 Iowa, 502; *Ohio Ins. Co.* v. *Marietta Woolen Co.*, 3 Ohio St. 348. If the note is absolute on its face, yet it cannot be assessed in any other way. *Ins. Co.* v. *Jarvis*, 22 Conn. 133. The assessment must accord with the vote to assess. Where a different and less amount is assessed, it cannot be collected. *Monmouth Ins. Co.* v. *Lowell*, 59 Me. 504. A vote leaving the per cent in blank is void. *St. Lawrence Ins. Co.* v. *Paige*, 1 Hilt. (N. Y.) 430. Where

the board of directors were illegally elected, the assessment was held invalid. *People's Ins. Co.* v. *Westcott*, 14 Gray (Mass.), 440. But it would seem that their election ought not to be collaterally questioned by a member. An irregularity in the election of president was held not to have that effect. *Currie* v. *Mut. Ass. Co.*, 4 H. &. M. (Va.) 318. An assessment can only be laid by the corporation, or a receiver clothed with its powers and not by an assignee. *Hurlbut* v. *Carter*, 21 Barb. (N. Y.) 221. The claims must be examined and their validity determined. *Embree* v. *Shideler*, 36 Ind. 423.

The courts, however, do not hold mutual insurance companies to any impossible strictness in the management of their affairs. Slight unintentional errors in estimating the percentage or calculating the amounts will not be regarded, nor will delay in laying the assessment invalidate it. *Marblehead Ins. Co.* v. *Underwood*, 3 Gray (Mass.), 210. The assessment need not be made after every loss, nor literally "forthwith," although so required. *N. E. Ins. Co.* v. *Belknap*, 9 Cush. (Mass.) 140; *Shaughnessy* v. *Rensselaer Ins. Co.*, 21 Barb. (N. Y.) 605. If losses occur at one time large enough to require the payment of all the premium notes, one assessment may be laid without regarding classes. *Rhinehardt* v. *Alleghany County Ins. Co.*, 1 Penn. St. 359; *Com.* v. *Mechanics' Ins. Co.*, 112 Mass. 192; *Sands* v. *Sanders*, 28 N. Y. (1 Tiff.) 416. An assessment cannot be defended against because the directors might have resisted the payment of some of the losses included in it. *Sands* v. *Hill*, 42 Barb. (N. Y.) 651. The intentional omission of any considerable amount of notes which are liable will make void the whole assessment. *Marblehead Ins. Co.* v. *Hayward*, 3 Gray (Mass.), 208; *Herkimer County Ins. Co.* v. *Fuller*, 14 Barb. (N. Y.) 373. But if the omission is with no fraudulent intent, and so small in amount as not to materially affect others, it will be disregarded. *Fayette Ins. Co.* v. *Fuller*, 8 Allen (Mass.), 27. So, uncollectible and worthless claims may be disregarded in making up the amounts for which to assess. *Maine Ins. Co.* v. *Neal*, 50 Me. 301. Interest on borrowed money, a reasonable allowance for failures to pay and for the expenses of collection, and for discount for prompt payment, may be included (*Jones* v. *Sisson*, 6 Gray [Mass.], 288; *Bangs* v. *Gray*, 2 Kern [N. Y.] 264); also, for return premiums on policies already canceled (*Fayette Ins. Co.* v. *Fuller*, 8 Allen [Mass.], 27); but not for premiums unearned at the time of the failure of the company. *Com.* v. *Mechanics' Ins. Co.*, 112 Mass. 192. Nothing can be added for existing bad debts. *York County Ins. Co.* v. *Bowden*, 57 Me. 286. An overlay of twenty-four per cent was held reasonable, and one of forty-eight per cent unreasonable. *People's Eq. Ins. Co.* v. *Peters*, 9 Allen

(Mass.), 319; *People's Eq. Ins. Co.* v. *Babbitt*, 7 id. 235. Members may be credited with payments on a prior illegal assessment and the amount included in the new assessment. *People's Eq. Ins. Co.* v. *Petitioners*, 9 Allen (Mass.), 319. Any overlay may be forbidden by statute. *Sinnissippi Ins. Co.* v. *Taft*, 26 Ind. 240. The length of time during which the insured has been a member is not to be considered in his favor. All persons who were members on the day of the loss are equally liable. *Herkimer Co. Ins. Co.* v. *Fuller* 14 Barb. (N. Y.) 373; *Planters' Ins. Co.* v. *Comfort*, 50 Miss. 662. Where the policies ran for different periods, the court allowed a division of the premium by the years of the policy, though the premium on long policies was smaller) *Citizens' Ins. Co.* v. *Sortwell*, 10 Allen [Mass.], 110), and the court have allowed other expenses and debts to be averaged in order to reach a practical and fair result. *People's Equitable Ins. Co.* v. *Petitioners*, 9 Allen (Mass.), 319. A new assessment for the whole of the premium note is good, although there is another assessment on it outstanding, uncollected. *Sands* v. *Sweet*, 44 Barb. (N. Y.) 108. No allowance is to be made for a return premium where the company is insolvent and all policies are canceled. *Com.* v. *Union Ins. Co.*, 112 Mass. 192. Accrued profits, although credited to the policies, remain absolute funds of the company till the policies are terminated. Id. The risks in mutual companies are often divided into classes. This can only be done by authority of the charter, or a vote of the members. *Thomas* v. *Achilles*, 16 Barb. (N. Y.) 491; *Currie* v. *Mut. Ass. Soc.*, 4 H. & M. (Va.) 315; *People's Equitable Ins. Co.* v. *Arthur*, 7 Gray (Mass.), 267. But assessments in each class are made by the company (*Kelly* v. *Troy Ins. Co.*, 3 Wis. 254), and must be kept separate for each class. *Allen* v. *Winne*, 15 Wis. 113. But if the assets of one class fail, resort may be had to any surplus in another class. *White* v. *Ross*, 15 Abb. Pr. (N. Y.) 66. In some cases there is a provision that on failure to pay an assessment the whole note may be recovered. *Jones* v. *Sisson*, 6 Gray (Mass.), 288. But if an assessment has been paid, this must be deducted and no interest is allowed. *Bangs* v. *Bailey*, 37 Barb. (N. Y.) 630; *Bangs* v. *McIntosh*, 23 Barb. (N. Y.) 591. If the by-laws treat the note as a payment in advance of the premium, the failure to pay such assessment does not suspend the insurance, as a failure to pay an ordinary assessment would. *Rix* v. *Mutual Ins. Co.*, 20 N. H. 198. It is ordinarily required that notice of the assessment shall be given to the insured. If any mode of notice is provided, it must be followed, otherwise personal notice is proper. *Jones* v. *Sisson*, 6 Gray (Mass.), 288; *York County Ins. Co.* v. *Knight*, 48 Me. 75. The notice need not state the amount due on each note. *At-*

lantic Ins. Co. v. *Sanders*, 36 N. H. 252; *Bangs* v. *Duckinfield*, 18 N. Y. (4 Smith) 592. Where the notice is required to be by mail, it may be sent to the residence named in the policy, unless the company has notice of a change. *Lothrop* v. *Greenfield Ins. Co.*, 2 Allen (Mass.), 82. The notice is a condition precedent to an action (*Williams* v. *Babcock*, 25 Barb. [N. Y.] 109), but actual notice has been held sufficient where the company is in the hands of a receiver. *Cooper* v. *Shaver*, 41 Barb. (N. Y.) 151. It cannot be given before the assessment is made. *Bangs* v. *McIntosh*, 23 Barb. (N. Y.) 591. Assessments may be voted at any regular meeting of the directors, although a special meeting for that purpose is authorized by the by-laws. *Bay State Ins. Co.* v. *Sawyer*, 12 Cush. (Mass.) 64; *Fayette Ins. Co.* v. *Fuller*, 8 Allen (Mass.), 27. The notice, if personal, is to be given to the person who is liable to pay it, whether the original member, or an assignee who has been admitted as a member in his stead, and has assumed the liabilities of the premium note. *Brannin* v. *Mercer County Ins. Co.*, 28 N. J. 92; *Bowditch Ins. Co.* v. *Winslow*, 3 Gray (Mass.), 415. Where the statute, as in many States, gives mutual insurance companies a lien on the estate insured, it has been held that they could not insure in another country where they could have no such lien. *Genesee Ins. Co.* v. *Westman*, 8 Up. Can. 487, but the contrary was held in regard to personal property in *Western* v. *Genesee Ins. Co.*, 2 Kern. (N. Y.) 258. Where they have not complied with the laws of the State in which they undertake to insure, the company may be liable to pay losses and yet be unable to collect any assessment. *Washington County Ins. Co.* v. *Dawes*, 6 Gray (Mass.), 376. It is a common provision that the directors of a mutual insurance company shall be personally liable for failure to lay an assessment when required to pay the debts. Where this liability was imposed for failure to pay a loss on a policy it was strictly construed, and it was held that the insured had no such remedy to enforce the payment of a note by which the policy had been paid. *Raber* v. *Jones*, 40 Ind. 436. If a new assessment is necessary to meet a deficiency caused by a failure to collect the first in full, it must be laid on the same members. *Farmers' Ins. Co.* v. *Chase*, 56 N. H. 341.

TITLE V.

REMEDIES.

ARTICLE I.

OF REMEDIES IN GENERAL.

Section 1. In general. The remedies for wrongs, committed by either party to the contract, are redressed by the same courts, and by the same proceedings, as are other wrongs sounding in contract. The first question which can well arise is whether any contract has been made. Where a contract has been completed, and for any reason the insurer refuses to deliver the policy, the insured may apply in equity to compel a delivery, and if in the meantime a loss has occurred, the court will also decree a payment of it. *Rhodes* v. *Railway Passengers Ins. Co.*, 5 Lans. (N. Y.) 71; *Union Ins. Co.* v. *Com. Ins. Co.*, 2 Curt. C. C. 524; S. C., 19 How. 318; *Fried* v. *Royal Ins. Co.*, 50 N. Y. (5 Sick.) 243; *Franklin Ins. Co.* v. *Hewitt*, 3 B. Monr. (Ky.) 231; *Harris* v. *Columbus County Ins. Co.*, 18 Ohio, 116. Either party may also complain that the policy as existing, does not express the contract as entered into, and may ask a court of equity to reform it. *Barrett* v. *Union Ins. Co.*, 7 Cush. (Mass.) 175; *Oliver* v. *Com. Ins. Co.*, 2 Curt. C. C. 277; *Phœnix Ins. Co.* v. *Hoffheimer*, 46 Miss. 645; *Longhurst* v. *Star Ins. Co.*, 19 Iowa, 364; *Van Tuyl* v. *Westchester Ins. Co.*, 55 N. Y. (10 Sick.) 657; *Nat. Traders' Bank* v. *Ocean Ins. Co.*, 62 Me. 519; *Keith* v. *Globe Ins. Co.*, 52 Ill. 518; 4 Am. Rep. 624; *Neville* v. *Merchants' Ins. Co.*, 19 Ohio St. 452; *N. Y. Ice Co.* v. *Northwestern Ins. Co.*, 23 N. Y. (9 Smith) 357. The court will also, at the same time, decree performance of the contract as reformed. The clearest evidence, free from reasonable doubt, will be required. Id. *Nat. Ins. Co.* v. *Crane*, 16 Md. 260; *Suydam* v. *Columbus Ins. Co.*, 18 Ohio, 459; *Cooper* v. *Farmers' Ins. Co.*, 50 Penn. St. 299; *Tesson* v. *Atlantic Ins. Co.*, 40 Mo. 33; *Woodruff* v. *Columbus Ins. Co.*, 5 La. Ann. 697. Where the insured had first brought suit on the policy, and being defeated, asked the court to reform it, his application was refused. *Thwing* v. *Great Western Ins. Co.*, 111 Mass. 93. The mistake must be a mutual one, and not caused by the fault of the party asking a reformation. *N. Y. Ice Co.* v. *Northwestern Ins. Co.*, 31 Barb. 72; *Cooper* v. *Farmers' Ins. Co.*, 50 Penn. St. 299. A mistake in the meaning of the words used will justify a reformation. The change will not

affect proofs already made. *Maher* v. *Hibernia Ins. Co.*, 67 N. Y. (22 Sick.) 283. In cases where, for any reason, the premium having been paid, the contract is never consummated, or the risk never attaches, or the policy is void *ab initio*, the premium may be recovered back, even on a count in a declaration for a loss on the policy. *Clark* v. *Manufacturers' Ins. Co.*, 2 Wood. & M. (C. C.) 472; *Mutual Ass. Co.* v. *Mahon*, 5 Call. (Va.) 517; *Tyrie* v. *Fletcher*, Cowp. 668; *Fowler* v. *Scottish Eq. Ins. Co.*, 28 L. J. Ch. 225; *Rochester Ins. Co.* v. *Martin*, 13 Minn. 59; *Foster* v. *U. S. Ins. Co.*, 11 Pick. (Mass.) 85 So, where there are two risks, and one never attaches, the premium, so. far as applicable to that, may be recovered back. Bunyon on Ins. 95. Of course, if the contract is once complete, no subsequent breach can entitle the insured to a return of the premiums (*Bermon* v. *Woodbridge*, 2 Doug. 781; *Fulton* v. *Lancaster Ins. Co.*, 7 Ohio, 325; *Merchants' Ins. Co.* v. *Clapp*, 11 Pick. [Mass.] 56); though if, after forfeiture, he pays premiums by mistake, he can recover them back. *McKee* v. *Phœnix Ins. Co.*, 28 Mo. 383. But if the policy was obtained by fraud, or is illegal, nothing can be recovered back. *Friesmuth* v. *Agawan Ins. Co.*, 10 Cush. (Mass.) 587; *Hoyt* v. *Gilman*, 8 Mass. 336; *Browning* v. *Morris*, Cowp. 790; *Howson* v. *Hancock*, 8 T. R. 575; *Russell* v. *De Grand*, 15 Mass. 35. A suit was sustained to revive a policy, where the insured had been unable to pay the premiums on account of a war, but had afterward tendered them to the company, who had refused to receive them, claiming a forfeiture. *Cohen* v. *N. Y. Ins. Co.*, 50 N. Y. (5 Sick.) 610; 10 Am. Rep. 522. On a wrongful refusal to receive premiums, the insured was allowed to treat the contract as at an end, and to recover back the premiums paid. *McKee* v. *Phœnix Ins. Co.*, 28 Mo. 383. The insured cannot reject the policy, and recover back a premium paid before its issue, simply because some of its terms are unsatisfactory, nor because the agent had not complied with the law as to foreign companies. *Leonard* v. *Washburn*, 100 Mass., 251. Directors who make, or permit, false statements as to the assets and condition of an insurance company, are personally liable to one who is induced thereby to insure. *Salmon* v. *Richardson*, 30 Conn. 360; *Pontifex* v. *Bignold*, 3 M. & G. 63; *Brown* v. *Downell*, 49 Me. 421; *Tibbetts* v. *Hamilton Ins. Co.*, 3 Allen (Mass.), 569. A mutual company may be compelled to readjust and correct a dividend to its members. *Luling* v. *Atlantic Ins. Co.*, 45 Barb. (N. Y.) 510; S. C., 51 N. Y. (6 Sick.) 207. The insurers may also have a remedy to compel the surrender of a policy obtained by fraud, or mistake, even after an assignment for value without notice. *British Eq. Ass. Co.* v. *G. W. Railway*, 20 L. T. (N. S.)

422; *Commercial Ins. Co.* v. *McLoon*, 14 Allen (Mass.), 351; *French* v. *Connelly*, 2 Austr. 454. But if the matter can as well be set up as a defense to an action at law, the court may refuse to interfere. *Phœnix Ins. Co.* v. *Bailey*, 13 Wall. (U. S.) 616. If a loss be paid under a mistake of facts pertaining to the loss, which would have been a defense, and which the insurers were not in fault in not knowing, it may be recovered back. *Mut. Life Ins. Co.* v. *Wager*, 27 Barb. (N. Y.) 354; *Hartford Ins. Co.* v. *Mathews*, 102 Mass. 221; *Berkshire Ins. Co.* v. *Sturgis*, 13 Gray (Mass.), 177; *McConnell* v. *Delaware Ins. Co.*, 18 Ill. 228. Thus where the insurers were ignorant of a forfeiture by subsequent insurance, they were allowed to recover back the amount of a loss which they had paid. *Columbus Ins. Co.* v. *Walsh*, 18 Mo. 229. This, however, only applies where there has been no judgment against them for the loss, for such judgment is conclusive in any subsequent action. *Mutual Life Ins. Co.* v. *Wager*, 27 Barb. (N. Y.) 354; *Homer* v. *Fish*, 1 Pick. (Mass.) 435. Foreign insurance companies which are prohibited from insuring till they have complied with certain conditions, cannot recover on their premium notes till such compliance. *Gen. Ins. Co.* v. *Phillips*, 13 Gray (Mass.), 90; *Ætna Ins. Co.* v. *Harvey*, 11 Wis. 394; *Cincinnati Ins. Co.* v. *Rosenthal*, 55 Ill. 85; 8 Am. Rep. 626; *Ford* v. *Buckeye State Ins. Co.*, 6 Bush (Ky.), 135; *National Ins. Co.* v. *Pursell*, 10 Allen (Mass.), 231. The policies, however, are generally held valid. *Columbus Ins. Co.* v. *Walsh*, 18 Mo. 229; *Leonard* v. *Washburn*, 100 Mass. 251; *contra*, *Rising Sun Ins. Co.* v. *Slaughter*, 20 Ind. 520.

§ 2. **Remedy by action.** We have already considered the preliminaries to any right of action by the insured on the policy. He must furnish the proofs, and all other evidence which the contract requires, and wait the period thereafter fixed by the policy, which is usually sixty days. If the insurer neglects or refuses to pay the sum claimed after the loss is payable, the insured may proceed by action at law. This suit may be brought either in his own county or that where the insurer is located. If the insurer is a foreign corporation, they are in most States required by law to appoint an agent on whom service of process can be made. If there is such agent, service must be on him, and not on their ordinary agents to solicit insurance. *Thayer* v. *Tyler*, 10 Gray (Mass.), 164. If the insurer is a foreign corporation, the insured will also have his election to sue in the Federal courts. The defendant may also remove the action from the State to the Federal courts, on complying with the statute for that purpose, unless they have waived the right to remove it. *Glen's Falls Ins. Co.* v. *Jackson Circuit Court*, 21 Mich. 577; 4 Am. Rep. 504. The action, when once begun, is to be tried

like any other action. It will only be necessary to consider some incidental questions which have arisen. On the question whether the risk had been increased, it has been held not a question for experts whether vacating a house would increase the risk. *Joyce* v. *Maine Ins. Co.*, 45 Me. 168; *Luce* v. *Dorchester Ins. Co.*, 105 Mass. 298; 7 Am. Rep. 522. Nor are their opinions that certain facts are material to the risk competent. *Jefferson Ins. Co.* v. *Cotheal*, 7 Wend. (N. Y.) 72; *Hartford Ins. Co.* v. *Harmer*, 2 Ohio St. 452; *contra*, *Kern* v. *South St. Louis Ins. Co.*, 40 Mo. 19; *Schenck* v. *Mercer County Ins. Co.*, 24 N. J. 447; *Rickards* v. *Murdock*, 10 B. & C. 527. But the fact that a higher rate of premium would be charged may perhaps be proved as indicating a material change. *Luce* v. *Dorchester Ins. Co.*, 105 Mass. 298; 7 Am. Rep. 522. The evidence of an expert was admitted on the issue of an increase of risk by changing the use of the property from a paint shop to a saloon. *Mitchell* v. *Home Ins. Co.*, 32 Iowa, 421. So to prove that the business of a farmer was considered the least hazardous occupation. *Hartman* v. *Keystone Ins. Co.*, 21 Penn. St. 466. An experienced and practical fireman may give his opinion whether the risk was increased by certain alterations. *Schenck* v. *Mercer County Ins. Co.*, 24 N. J. 447. A builder may be asked whether a house with walls filled with brick is a brick house. *Mead* v. *Northwestern Ins. Co.*, 7 N. Y. 530. If the issue depends on facts that involve no peculiar skill, science or information, but are equally within the knowledge of men in general, the evidence is not admissible. *Lyman* v. *State Ins. Co.*, 14 Allen (Mass.), 329. So if the question involves simply a conclusion of law. *Rider* v. *Ocean Ins. Co.*, 20 Pick. (Mass.) 259. *Lindauer* v. *Delaware Ins. Co.*, 13 Ark. 461. A medical witness cannot state the meaning of the phrase "family physician." *Reid* v. *Piedmont Ins. Co.*, 58 Mo. 421. In life insurance, where questions of health or disease arise, physicians may give their opinions as to the cause and effects of disease (*Miller* v. *Mut. Ben. Ins. Co.*, 31 Iowa, 216; 7 Am. Rep. 122); but not on the question whether the applicant was an insurable subject. *Rawles* v. *American Ins. Co.*, 36 Barb. (N. Y.) 357; S. C., 27 N. Y. (13 Smith) 282. As we have seen, evidence of custom may in some cases be admissible in the construction of an instrument. It must be brought home to the knowledge of the insurers, either as a universal custom, or one which they have themselves practiced. *Adams* v. *Otterback*, 15 How. (U. S.) 539; *Hartford Ins. Co.* v. *Harmer*, 2 Ohio St. 452; *Howard* v. *Great Western Ins. Co.*, 109 Mass. 384. Evidence of a custom of one insurance company is not enough. *Luce* v. *Dorchester Ins. Co.*, 105 Mass. 297; 7 Am. Rep. 522. It cannot control the law (*Thwing* v.

Great Western Ins. Co., 111 Mass. 93); nor the contract in points where it is explicit. *Davis* v. *Galloupe*, 111 Mass. 121. A general custom to give days of grace on the payment of premiums may be proved. *Helme* v. *Philadelphia Ins. Co.*, 61 Penn. St. 107; *contra*, *Mut. Ben. Ins. Co.* v. *Ruse*, 8 Ga. 534. The recital in a premium note of the issue of the policy is *prima facie* evidence of it in a suit on the note. *N. E. Ins. Co.* v. *Belknap*, 9 Cush. (Mass.) 140. So is the admission of the secretary of the insurance company. *Sussex County Ins. Co.* v. *Woodruff*, 26 N. J. 542. So the recital of the receipt of the premium in the policy is evidence of its payment. *Baker* v. *Union Ins. Co.*, 43 N. Y. (4 Hand) 283; *Bergson* v. *Builders' Ins. Co.*, 38 Cal. 541; *Ins. Co. of Penn.* v. *Smith*, 3 Whart. (Penn.) 520; *Roberts* v. *N. E. Ins. Co.*, 2 Disney (Ohio), 106; *Pitt* v. *Berkshire Ins. Co.*, 100 Mass. 500; *Troy Ins. Co.* v. *Carpenter*, 4 Wis. 20; *contra*, *Prov. Ins. Co.* v. *Fennell*, 49 Ill. 180. The premium note signed by the insured is evidence against him of the due organization of the company. *Williams* v. *Cheney*, 3 Gray (Mass.), 215. A man's religious belief raises no presumption on an issue of suicide. *Gibson* v. *Am. Ins. Co.*, 37 N. Y. (10 Tiff.) 580.

Suicide raises no presumption of insanity. The burden is on the party charging it. *Life Ins. Co.* v. *Terry*, 1 Dill. (C. C.) 403; S. C., 15 Wall. 580; *Knickerbocker Ins. Co.* v. *Peters*, 42 Md. 414. The presumption is against suicide where the circumstances are ambiguous. *Mallory* v. *Travelers' Ins. Co.*, 47 N. Y. (2 Sick.) 52; 7 Am. Rep. 410. Evidence of a current rumor is not admissible to prove the motive unless it is proved also that the rumor was known to the party. *St. Louis Ins. Co.* v. *Graves*, 6 Bush (Ky.), 268. Whatever is common and usual under given circumstances, is evidence of what is reasonable. *Crocker* v. *People's Ins. Co.*, 8 Cush. (Mass.) 79. The burden of proving answers in the application untrue is on the insurers. *Piedmont Life Ins. Co.* v. *Ewing*, 92 U. S. 377; *Breard* v. *Mechanics' Ins. Co.*, 29 La. Ann. 764; *Jones* v. *Brooklyn Ins. Co.*, 61 N. Y. (16 Sick.) 79. The application is presumed to be made by the insured. *Hartford Ins. Co.* v. *Gray*, 80 Ill. 28. In declaring on an insurance policy, the plaintiff must set out so much of the contract as will show a right in himself to recover and he must allege performance of all such duties, and the existence of all such facts, as are a condition precedent to a recovery. *Rockford Ins. Co.* v. *Nelson*, 65 Ill. 415; *Bobbitt* v. *Liverpool Ins. Co.*, 66 N. C. 70; 8 Am. Rep. 494; *Campbell* v. *N. E. Ins. Co.*, 98 Mass. 381. Warranties not set out in the policy need not be stated in the declaration, but the officer who made the certificate of loss should be. *Simmons* v. *Ins. Co.*, 8 W. Va.

474. The declaration must allege that proofs were furnished or that they were waived. *Home Ins. Co.* v. *Lindsey*, 26 Ohio St. 348. But an allegation that they had due notice is enough after verdict. *Conway Ins. Co.* v. *Sewall*, 54 Me. 352. In *Schultz* v. *Merchants' Ins. Co.*, 57 Mo. 331, it was held that a waiver might be proved without any special averment. An allegation that the insured had performed all the conditions on his part was held sufficient. *Home Ins. Co.* v. *Duke*, 43 Ind. 418. The plaintiff must allege an insurable interest, or if he has none, he must state the grounds on which he rests his right to recover. *Freeman* v. *Fulton Ins. Co.*, 38 Barb. (N. Y.) 247. He need not aver ownership unless he has warranted it. *Gilbert* v. *National Ins. Co.*, 12 Ir. Law, 143; *contra*, *Illinois Ins. Co.* v. *Marseilles Manf. Co.*, 1 Gilm. (Ill.) 236. Where the purchaser or the assignee of the "subject insured" is entitled to sue, he must allege that he has the entire interest. *Granger* v. *Howard Ins. Co.*, 5 Wend. (N. Y.) 200. After verdict, an allegation that "his" store was consumed is enough, and an omission to allege the value of the property destroyed, cannot then be objected to (*Lane* v. *Maine Ins. Co.*, 12 Me. 44; *Ins. Co.* v. *Seitz*, 4 W. & S. [Penn.] 273; *N. H. Ins. Co.* v. *Walker*, 30 N. H. 324; *Howard Ins. Co.* v. *Cornick*, 24 Ill. 455), but it may be on demurrer. *Fowler* v. *N. Y. Ind. Ins. Co.*, 26 N. Y. (11 Smith) 422. An allegation that the defendant insured the plaintiff on certain property, sufficiently states an interest. *Rising Sun Ins. Co.* v. *Slaughter*, 20 Ind. 520. It need not be alleged that the insurance company have complied with the laws admitting them to the State. *Fitzsimmons* v. *City Ins. Co.*, 18 Wis. 234; *Germania Ins. Co.* v. *Curran*, 8 Kans. 9. The plaintiff need not aver the truth of the statements of the application (*Herron* v. *Peoria Ins. Co.*, 28 Ill. 235), for fraud or falshood in these is matter of defense, nor need he aver the performance of conditions subsequent (*Ketchum* v. *Prot. Ins. Co.*, 1 Allen [N. B.], 136), nor negative prohibited acts, or deny that he is within the excepted risks. *Hunt* v. *Hudson River Ins. Co.*, 2 Duer (N. Y.), 481; *Troy Ins. Co.* v. *Carpenter*, 4 Wis. 20; *Lounsbury* v. *Protection Ins. Co.*, 8 Conn. 459. Where the declaration shows that the loss is payable a certain time after the proofs are furnished it must allege that that time has elapsed. *Doyle* v. *Phœnix Ins. Co.*, 44 Cal. 264. No interest is allowed till after a judicial demand. *Gettwerth* v. *Teutonia Ins. Co.*, 29 La. Ann. 30.

§ 3. **Defenses to actions.** When an action is brought upon a policy to recover the amount of a loss the defense may be either an attempt to negative some matter which the plaintiff must allege and prove, as considered in the previous section, or the insurer may undertake an

affirmative defense, and after complying with the local rules of pleading prove some matter in avoidance and discharge of the contract. Such matters would be: fraud which is a defense to every contract, a breach of some warranty, or the falseness of some representation, accord and satisfaction, or payment. The fraud may be either in the inception of the contract, or in the loss under it. Thus, the insurer may prove that the insured himself fired the building. Where the charge is criminal arson, some authorities require proof beyond a reasonable doubt, as in criminal cases. *Thurell* v. *Baumont*, 1 Bing. 339; *Shultz* v. *Pacific Ins. Co.*, 2 Ins. L. J. 495; *Butman* v. *Hobbs*, 35 Me. 227; *McConnele* v. *Delaware Ins. Co.*, 18 Ill. 228. Other cases apply the ordinary rule of civil cases. *Schmidt* v. *N. Y. Union Ins. Co.*, 1 Gray (Mass.), 529; *Washington Ins. Co.* v. *Wilson*, 7 Wis. 169; *Wightman* v. *Western Ins. Co.*, 8 Robt. (La.) 442; *Scott* v. *Home Ins. Co.*, 1 Dil. (U. S.) 105. The grounds of defense must be fully set out. *Sussex Ins. Co.* v. *Woodruff*, 26 N. J. 541. It is not enough to negative the truth of a declaration in the application. The particulars in which it is untrue must be set out. *Clay Ins. Co.* v. *Wusterhausen*, 75 Ill. 285. Where the application denied disease, and the breach charged was that he had had symptoms of disease of the stomach, the particular symptoms must be set out. *Marshall* v. *Emperor Ins. Co.*, L. R., 1 Q. B. 35. So, where misrepresentation, or breach of warranty as to title, is charged. *Kentucky Ins. Co.* v. *Southard*, 8 B. Monr. (Ky.) 634; *Merchant Ins. Co.* v. *Washington Ins. Co.*, 1 Hand (Ohio), 408; *Dewees* v. *Manhattan Ins. Co.*, 34 N. J. 244. The particulars in which a fireplace is defective must be set out. Id.; so of other insurance (*Ramsay Man. Co.* v. *Mut. Ins. Co.*, 11 Up. Can. 516); or of fraud, and it must be stated that it was committed by some one in interest. *Ferriss* v. *N. A. Ins. Co.*, 1 Hill (N. Y.), 71; *Sterling* v. *Mercantile Ins. Co.*, 32 Penn. St. 75. A charge of overvaluation must allege that it was made by the insured knowingly, and in the preliminary application. *Aurora Ins. Co.* v. *Johnson*, 46 Ind. 315. If an assignment is set up as a breach, it must aver that the insurers did not assent (*Peoria Ins. Co.* v. *Lewis*, 18 Ill. 553); and that the assignment was before the loss (*Ill. Ins. Co.* v. *Stanton*, 57 Ill. 354); and what constituted the alleged change of title, if that is the defense. *Clay Ins. Co.* v. *Wusterhausen*, 75 Ill. 285. A plea that the damage accrued before the plaintiff became interested is bad. *Sutherland* v. *Pratt*, 11 M. & W. 296. Evidence of fraud or false swearing is not admissible under the general issue. *Flynn* v. *Merchants' Ins. Co.*, 17 La. Ann. 135. A charge of false swearing in the proofs must show where and before whom it was taken, and in what particular it was false. *Ketchum* v. *Prot. Ins. Co.*, 1 Allen (N. B.), 136.

§ 4. **Bankruptcy and insolvency.** An insurance company is within the bankrupt acts. *Reed* v. *Independent Ins. Co.*, 1 Ins. L. J. 735. *In re Hercules Ins. Co.*, 1 Ins. L. J. 875. After bankruptcy the court assumes all the powers of the company, and may direct assessments and collect the assets, as fully as it could have done, or even more so, as it represents the creditors. It is immaterial that notes are payable only when called by the directors, and a previous vote of the directors to release a balance due on stock notes is void. *Upton* v. *Hausborough*, 5 Chicago L. N. 242. But an assignee has no power to waive conditions of the policy. *In re Firemen's Ins. Co.*, 5 Chic. Leg. News, 253; *Evans* v. *Trimountain Ins. Co.*, 9 Allen (Mass.), 329. In many States the settlement of the affairs of insolvent insurance companies is regulated by statute. The assignee or receiver must prove that the facts authorize any assessment which he attempts to make. *Savage* v. *Medbury*, 19 N. Y. (5 Smith) 32; *Sands* v. *Hill*, 42 Barb. (N. Y.) 651. A voluntary assignment does not transfer the right to make assessments. *Hurlbut* v. *Carter*, 21 Barb. (N. Y.) 221.

§ 5. **Set-off.** Both parties are entitled to claim a set-off of mutual claims arising out of the contract. Thus where the insurers sued an indorser on a note, they were required to allow a return premium due the maker, although he was indebted to them on other accounts, and insolvent. *Phœnix Ins. Co.* v. *Fiquet*, 7 Johns. (N. Y.) 384. It makes no difference that the loss occurred after bankruptcy. *Graham* v. *Russell*, 2 Marsh. 561. Where the insurer became insolvent, and the policy lapsed, the insured was not allowed to set off its cash value in a suit on the premium note. *North Carolina Ins. Co.* v. *Powell*, 71 N. C. 389. A set-off is allowed of a liquidated debt to the company, even as against an unliquidated debt due from them. *Holbrook* v. *American Ins. Co.*, 6 Paige (N. Y.), 220. A loan to the insured was set off against a loss. (*In re Globe Ins. Co.*, 2 Edw. Ch. [N. Y.] 625); even if the loan is secured (*Com.* v. *Shoe and Leather Dealers' Ins. Co.*, 112 Mass. 131); or even if it is not due unless it was made with notice of insolvency in fact. *Drake* v. *Rollo*, 6 Chicago Leg. News, 9; *Smith* v. *Hill*, 8 Gray (Mass.), 572. But where the debt to the company is for a subscription to the capital, or a stock note, it cannot be set off if the company is insolvent. *Scammon* v. *Kimball*, 6 Chic. Leg. News, 1. And the same rule applies to assessments on premium notes, otherwise the insured would gain an advantage over the other creditors. *Hillier* v. *Alleghany County Ins. Co.*, 3 Penn. St. 470; *Lawrence* v. *Nelson*, 4 Bosw. (N. Y.) 240; S. C., 21 N. Y. (7 Smith) 158; *Swamscott Machine Co.* v. *Partridge*, 25 N. Y. (10 Smith) 369. A claim assigned to the insured cannot be set off against an assessment, except to the extent to

which it would draw a dividend. *Long* v. *Penn. Ins. Co.*, 6 Penn. St. 421. In settling losses, the insurers, if solvent, may set off all sums due on premium notes, and a just proportion of the losses up to the time of payment. *Swamscott Machine Co.* v. *Partridge*, 25 N. H. 369.

CHAPTER LXXXIII.

INTEREST ON MONEY.

ARTICLE I.

OF INTEREST GENERALLY.

Section 1. General nature of interest. Interest is the compensation which is paid by the borrower of money to the lender for its use and, generally, by a debtor to his creditor in recompense for his detention of the debt. 1 Bouv. Law Dict. 733. The liability, in damages, for the wrongful detention of a debt, is a distinct principle from liability to make compensation for a use or benefit derived from the money of another. *Hummel* v. *Brown*, 24 Penn. St. 313; *Selleck* v. *French*, 1 Conn. 32; S. C., 1 Am. L. Cas. 610.

Interest is a necessary incident to the principal debt, and a promise may be implied to pay it from the day the debt becomes due, if it is not paid. *Roberts* v. *Cocke*, 28 Gratt. 207. The promise is supported by the universal obligation which rests upon every man to render a just equivalent for the use or detention of that which does not belong to him. *Reid* v. *Rensselaer Glass Factory*, 3 Cow. 393; 5 id. 587; *Heath* v. *Page*, 63 Penn. St. 108; 3 Am. Rep. 533. So, arrears of interest relate to the principal charge and form part of it. *Wertz's Appeal*, 65 Penn. St. 306.

§ 2. **Interest, when allowed.** It is a principle, well settled, that whenever the debtor knows what he is to pay, and when he is to pay it, he shall be charged with interest if he neglects to pay. *Swett* v. *Hooper*, 62 Me. 54; *People* v. *New York*, 5 Cow. 331; *Dodge* v. *Perkins*, 9 Pick. 369. So, interest is allowed for services rendered, from the time when the ascertained amount became due. *Carpenter* v. *Brand*, 40 N. Y. Sup. Ct. 551; *Risley* v. *Andrew Co.*, 46 Mo. 382. On money lent from the time of the loan. *Rapelie* v. *Emory*, 1 Dall. 349; *Lessee of Dilworth* v. *Sinderling*, 1 Binn. 488. On money paid for the account, or to the use or benefit, or at the request of another, from the time of payment. *Goodloe* v. *Clay*, 6 B. Monr. (Ky.) 236; *Aiken* v. *Peay*, 5 Strobh. 15; *Weeks* v. *Hasty*, 13 Mass. 218. On money ad-

vanced by a factor or agent, from the time of the advance. *Cheeseborough* v. *Hunter*, 1 Hill (So. Car.) 400; *Smetz* v. *Kennedy*, Riley, 218; *Taylor* v. *Knox's Exrs.*, 1 Dana, 391; S. C., 5 id. 466.

As a general rule no interest should be allowed on an unliquidated account for goods, wares and merchandise, without an agreement to allow it, express or implied; because the balance of the account only constitutes the debt, and, until that is ascertained, there is, strictly speaking, no debt due. *Reid* v. *Rensselaer Glass Factory*, 3 Cow. 393; S. C., 5 id. 589; *Adams Express Company* v. *Milton*, 11 Bush (Ky.), 49; *Brady* v. *Wilcoxon*, 44 Cal. 239; *Youqua* v. *Nixon*, Peter's C. C. 224. This rule also applies to services rendered on a *quantum meruit* (*Brewer* v. *Tyringham*, 12 Pick. 547; *Doyle's Admrs.* v. *St. James' Church*, 7 Wend. 178; *Murray* v. *Ware's Admr.*, 1 Bibb, 325), and to such charges as a forwarding merchant's for freight, wharfage and storage. *Trotter* v. *Grant*, 2 Wend. 413. But interest should be allowed on an unliquidated demand, the amount of which could be ascertained by computation, together with reference to well-established market values; because such values are so nearly certain that it would be possible for the debtor to obtain some proximate knowledge of how much he was to pay. *Sipperly* v. *Stewart*, 50 Barb. 62, 69.

It has been held in New York that in an action upon an unliquidated demand interest may properly be allowed from the time of the commencement of the action. *McCollum* v. *Seward*, 62 N. Y. (17 Sick.) 316.

In general, interest is not due in law on unliquidated damages, or uncertain demands. *Still* v. *Hall*, 20 Wend. 51; *Admr. of Congers* v. *Magrath*, 4 McCord, 392; *Tatum* v. *Mohr*, 21 Ark. 355. But there are many cases in which, though the damages are unliquidated, yet the amount to be paid, and the time when it should be paid, are sufficiently certain to render the party liable for interest. As in an action on a policy of insurance, in case of partial loss, interest as damages may be allowed from the time when payment should have been made after proof of loss. *Vredenbergh* v. *Hallett*, 1 Johns. Cas. 27; *Obermyer* v. *Nichols*, 6 Binn. 159; *Oriental Bank* v. *Tremont Ins. Co.*, 4 Metc. 1–9. In an action for the breach of an executory agreement to deliver articles on a certain day, the measure of damages is the value of the articles on the day when they ought to have been delivered, with interest from that time. *Younger* v. *Givens*, 6 Dana, 1; *Enders* v. *Board of Public Works*, 1 Gratt. 365; *Meason* v. *Philips*, Add. (Penn.) 346. In an action for damages sustained by a collision, interest should be allowed from the day on which the injury happened. *The Morn-*

ing Star, 4 Biss. C. C. 62. But the interest in such cases rests so entirely upon the circumstances of each particular case, that the allowance thereof is commonly said to be in the discretion of the jury. *Lincoln* v. *Claflin*, 7 Wall. (U. S.) 132. So, too, as to the allowance of interest in the settlement of partnership accounts. *Gyger's Appeal*, 62 Penn. St. 73. But where labor and services in a partnership agreement are put against capital, on settlement of the accounts of the partnership, interest will not be allowed on the amount of cash capital. *Jackson* v. *Johnson*, 11 Hun (N. Y.), 509.

Interest from the commencement of the suit is recoverable on a money demand, even though it is not claimed in the petition. *Whitaker* v. *Pope*, 2 Woods, 463. And it is payable in the same kind of money as the principal. *McCalla* v. *Ely*, 64 Penn. St. 254.

In assumpsit, interest on the principal sum may be made the subject of a charge as one of the items of an account annexed, and may be recovered upon proof of circumstances which would entitle the plaintiff to charge it. *Chadbourne* v. *Hanscom*, 56 Me. 554. And interest may be recovered upon a promissory note after the principal has been paid, if the note contain an express promise to pay such interest. *Robbins* v. *Cheek*, 32 Ind. 328; 2 Am. Rep. 348. So, interest is recoverable on the penalty of a bond to pay incumbrances from the time of the breach. *Beers* v. *Shannon*, 12 Hun (N. Y.), 161.

§ 3. **Interest, when not collectible.** An action will not lie to recover interest after the principal has been paid, unless there was an express contract to pay interest. *Robbins, &c., Co.* v. *Brewer*, 48 Me. 481; *Tenth Nat. Bank* v. *Mayor, &c., of New York*, 4 Hun, 429. In the absence of a special agreement to the contrary, bankers are not required to pay interest on ordinary deposits. *Parsons* v. *Treadwell*, 50 N. H. 356.

§ 4. **Interest, when allowed upon accounts.** Where an account has been liquidated by both parties, and the debt therefor becomes due and payable, it carries interest on the same ground of a debt payable at a specific time, viz.: that there is an implied contract to pay. *Rensselaer Glass Factory* v. *Reid*, 5 Cow. 589; *Selleck* v. *French*, 1 Conn. 32; S. C., 1 Am. L. Cas. 610; *Elliott* v. *Minott*, 2 McCord (S C.), 125. If there be an express promise to pay at a certain time, or an express understanding between the parties that the accounts are to be considered due at a particular date after they are incurred, or there be an established usage of trade, or a custom in the plaintiff's dealings, by which the defendant is affected, to give a certain length of credit, this becomes a part of the contract, and interest is to be allowed after the express or implied term of credit has expired. *McAllister* v. *Reab*,

4 Wend. 484; S. C., 8 Wend. 109; *Raymond* v. *Isham*, 8 Vt. 258; *Obermyer* v. *Nichols*, 6 Binn. 159.

Where a debtor on presentation of his account admits its correctness and promises to pay it, this will render it liquidated, so as to draw interest thereafter. *Daniels* v. *Osborn*, 75 Ill. 615; *Wood* v. *Belden*, 59 Barb. 549; 54 N. Y. (9 Sick.) 658. But the statement of an account stated, made between trustees and third persons, in which there is an agreement to pay interest upon a sum, part of which was not then legally due, will not bind the *cestui que trust* although for several years, after he obtains knowledge of such account stated, he gives no notice to such third persons of his dissent therefrom. *Church* v. *Kidd*, 3 Hun (N. Y.), 254; S. C., 5 T. & C. 454.

A party who receives notes, property and cash, for which he agrees to execute his promissory note in a given sum, makes thereby the account or debt a liquidated one and is liable for interest thereon. *Clark* v. *Dutton*, 69 Ill. 379.

The balance of a settled account in which interest is included carries interest on the whole from the settlement. *McClelland* v. *West*, 70 Penn. St. 183.

If there be an unreasonable and vexatious delay in making payment of an account, though it be not liquidated, interest may be recovered. *Williams* v. *Craig*, 1 Dall. (Penn.) 313; *Wills* v. *Brown*, Penn. (N. J.) 548; *Jassoy* v. *Horn*, 64 Ill. 379.

Accounts for money lent, paid and advanced, always bear interest. *Liotard* v. *Graves*, 3 Caines, 226; *Lessee of Dilworth* v. *Sinderling*, 1 Binn. 488; *Craven* v. *Tickell*, 1 Ves., Jr., 60. And in an unliquidated account, those items, if any there be, of moneys advanced, paid, laid out or expended, will draw interest from the time of the advance or expenditure. *Reid* v. *Rensselaer Glass Factory*, 3 Cow. 393, 426.

§ 5. **Interest, when not allowed upon accounts.** As has been stated *ante*, 127, § 2, an open and unliquidated account does not bear interest unless there is an express agreement to that effect (*Marsh* v. *Fraser*, 37 Wis. 149; *Farmers' Loan, etc., Co.* v. *Mann*, 4 Robt. [N. Y.] 356; *Williams* v. *Hersey*, 17 Kans. 18); or unless the delay of payment has been fraudulent, unjust or oppressive. *The People* v. *Gasherie*, 9 Johns. 71; *Wood* v. *Robbins*, 11 Mass. 504; *Brown* v. *Campbell*, 1 Serg. & Rawle, 179. But where the delay is the result of the creditor's failure to press the collection of his claim, and where the principal cause of action is an unliquidated account, unless interest or damages are claimed in the petition, no judgment will be rendered for either. *Adams Ex. Co.* v. *Milton*, 11 Bush (Ky.), 49.

Where parties are engaged in continuous dealings, the presentation of bills at various times, stating parts of the account, does not raise the presumption of liquidation under which interest is thereafter chargeable upon the balances shown to be due. *Raymond* v. *Williams*, 40 Iowa, 117.

Tenants in common, using iron ore from the common property, without requiring each other to account, cannot charge interest, one against the other, until a balance is struck. *Grubb's Appeal*, 66 Penn. St. 117,

§ 6. **Interest on annuities.** See, generally, the subject of Annuities, Vol. I, 323. Where no time is mentioned by the testator, annuities are considered as commencing from the death of the testator; and, consequently, the first payment will be due at the end of the year from that event; if, therefore, it be not made then, interest, in those cases wherein it is allowed at all, must be computed from that period. 1 Bouv. Law Dict. 735. But the general rule is that interest is not payable on the arrears of an annuity bequeathed by will, unless under special circumstances. *Isenhart* v. *Brown*, 2 Edw. Ch. 341; *Adams' Adm'r* v. *Adams' Adm'r*, 10 Leigh, 527. Under special circumstances, as where the annuity is in lieu of dower, it may be payable. *Beeson's Admr's* v. *Beeson's Ex'r*, 1 Harring. (Del.) 394; *Houston* v. *Jamison's Adm'r*, 4 id. 330; *Philips* v. *Williams*, 5 Gratt. 259.

§ 7. **Interest on implied contracts.** Generally, neither by common law, nor by statute, is a party required to pay interest. Hence no man is liable to pay interest, *as such*, without his own agreement to that affect; and its allowance by the courts, as an incident to the debt, and invariably following it, is founded solely upon the agreement of the parties. In another class of cases it is allowed by juries under the advice of the court, but in their absolute discretion, *as damages*. The confusion and mingling of these classes has led to much of the difficulty which has arisen on this subject. The two classes depend upon principles entirely distinct, and do not furnish even an analogy to each other. *Rens. Glass Factory* v. *Reid*, 5 Cow. 589, 610.

The agreement to pay interest may be expressed in writing, or by words, or it may be implied. It may be implied:

1st. From the custom or usage of the business in which the debt is contracted. When such custom is known to the parties, or may reasonably be presumed to have been known, it enters into the original contract and forms part of it. *Liotard* v. *Graves*, 3 Caines, 226; *Ayers* v. *Metcalf*, 39 Ill. 307; *Koons* v. *Miller*, 3 Watts & Serg. 271.

2d. When the principal is to be paid at a specific time, the law has always implied an agreement to make good the loss arising from a

default, by the payment of interest. *Robinson* v. *Bland*, 2 Burr. 1086; *Selleck* v. *French*, 1 Conn. 32; *Rens. Glass Factory* v. *Reid*, 5 Cow. 589, 612. And if a note be payable at a fixed time, as at one day after date, and there be a subjoined agreement that suit shall not be brought so long as the maker is alive, or the payee is satisfied that he is solvent, interest still runs from the time when the debt is legally due. *Powell, Adm'r*, v. *Guy*, 3 Dev. & Bat. (N. C.) 70; *Rollman, Adm'r*, v. *Baker, etc.*, 5 Humph. 406. A note made payable during the whole of a given month does not bear interest until after the last day of the month. *Pollard* v. *Yoder*, 2 A. K. Marsh. 264. Where an account has been liquidated by both parties, and the debt therefor becomes due and payable, it carries interest on the same principle as that of a debt payable at a specific time. *Boddam* v. *Riley*, 2 Bro. C. C. 3; *Catlin* v. *Aikin*, 5 Vt. 177; *Moore* v. *Patton*, 2 Port. (Ala.) 451.

Where the defendant was employed to recover back duties which had been paid by the plaintiffs on the importation of bronze powder and Dutch metal, in excess of what it was claimed could be legally imposed by the United States authorities; and it was agreed that he should retain one-half of the excess recovered for his services, one-half of the interest which was recovered *with* the excess was permitted to be retained by the defendant, it being an incident to the principal or portion of the excess which by the agreement became his for the services rendered. *Barbey* v. *Ludington*, 10 Hun (N. Y.), 305.

Where a majority of the stockholders of a bank sold to others their interest in the capital, according to a certain statement of assets, with a stipulation that if any debt not included therein should thereafter be paid to the bank, the purchasers should "forthwith" pay to the sellers their proportion thereof, deducting expenses, interest would be allowed on such collections when made but not forthwith paid over to the sellers. *Parsons* v. *Treadwell*, 50 N. H. 356.

§ 8. **Interest on sales of goods.** Interest is not allowed on an unliquidated account for goods sold and work done, unless there is an agreement, express or implied, to allow interest. *Van Beuren* v. *Van-Gaasbeck*, 4 Cow. 496; *Henry* v. *Risk*, 1 Dall. 265; *Harrison* v. *Handley*, 1 Bibb, 443. But where it is the uniform custom of a trader to charge interest after a certain time, he is allowed to charge it accordingly to those who are in the habit of dealing with him with a knowledge of that fact. *McAllister* v. *Reab*, 4 Wend. 483; *Raymond* v. *Esham*, 8 Vt. 263; *Knox* v. *Jones*, 2 Dall. 193. And a promise to pay interest may be inferred from the particular mode of dealing between the parties. *Ayers* v. *Metcalf*, 39 Ill. 307. In open mutual account

between merchant and merchant, except on money advances, no interest is allowed until a balance is struck and notice of it given. *Kane* v. *Smith*, 12 Johns. 156; *Crawford* v. *Willing*, 4 Dallas, 286; *Davis* v. *Smith*, 48 Vt. 53. On a sale for cash of a lot of apples at a given price per barrel, interest on the sum due is recoverable in an action for the price. *Maltman* v. *Williamson*, 69 Ill. 423.

§ 9. **Interest on simple contracts.** Interest will be allowed in all cases where there is an express contract to pay it. *Selleck* v. *French*, 1 Conn. 32. And see *Capen* v. *Crowell*, 66 Me. 282; *Pierce* v. *Proprietors, etc.*, 10 R. I. 227; *Cook* v. *Fowler*, L. R., 7 H. L. 27. If due by simple contract, *assumpsit* will lie for the interest as it falls due. *Cooley* v. *Rose*, 3 Mass. 221.

In an action for use and occupation, if the amount claimed for each year be a mere unliquidated demand, sounding entirely in damages, which are not ascertained until the finding of a jury on a *quantum valebant*, interest on the sum assessed by the jury for the annual rent will not be allowed. *Skirving* v. *Stobo*, 2 Bay (S. C.), 233. But on an agreement to pay so much *per* month for services, interest runs from the time when the money falls due. *Still* v. *Hall*, 20 Wend. 51. In an action upon a *quantum meruit* to recover an alleged balance due for services, where, when the plaintiff left the defendant's employ, he demanded his pay and commenced his action about a month thereafter, the court allowed interest from the time of the demand. *Mercer* v. *Vose*, 67 N. Y. (22 Sick.) 56. One who purchases goods that have been attached under an arrangement with the parties interested, that he should not be called upon for the price until the question of ownership was settled, is not liable for interest on the price, before the payment becomes due and is demanded. *Evans* v. *Beckwith*, 37 Vt. 285.

§ 10. **Interest on sealed instruments.** In England, interest cannot be recovered on a bond with a penalty for a sum beyond the penalty either at law or in equity. *Wild* v. *Clarkson*, 6 Term, 303; *Hellen* v. *Ardley*, 3 C. & P. 12, *Clarke* v. *Abingdon*, 17 Ves., Jr., 106. This rule, however, is subject to exceptions, and apparently it never obtained with us, either in one jurisdiction or in the other. *Tazewell* v. *Saunders*, 1 3 Gratt. (Va.) 366; *Tennants* v. *Gray*, 5 Munf. 494; *Mower* v. *Kip*, 6 Paige, 88.

A distinction has been taken in England between instruments of a commercial nature such as bills of exchange, and other contracts, that on the latter, interest is not due without an agreement for it express or implied, though on the former it is, by the usage of trade. *Gordon* v. *Swan*, 2 Campb. 429, *note;* S. C., 12 East, 419. In this country no

such distinction exists, save in South Carolina, and interest is allowed on all liquidated demands from the time that payment ought to have been made. *Reid* v. *Rens. Glass Factory*, 3 Cow. 393; *Dodge* v. *Perkins*, 9 Pick. 369; *Cartmill* v. *Brown, Admr.*, 1 A. K. Marsh. 576. In Maryland, the rule is said to be, that on written contracts to pay on a certain day, and on bonds, and where there is a contract to pay interest, and where money has been used, interest is due of course, but that in all other cases it is at the discretion of the jury. *Newson's Admr.* v. *Douglass*, 7 Harr. & Johns. 418; *Karthaus* v. *Owings*, 2 Gill & Johnson, 431; *Comegys* v. *State*, 10 id. 176. In an action to recover rent due on leased premises, where the defendant was surety in the lease and the time when the rent should commence was to be decided by arbitrators, it was held that the defendant was liable for interest on the amount of rent found due, only from the date of such decision. *Binsse* v. *Wood*, 47 Barb. 624.

§ 11. **Interest on negotiable instruments.** An express agreement to pay interest will give a valid title to recover it, although the principal debt be not due at the time when the interest is made payable (*Stearns* v. *Brown*, 1 Pick. 530; *Bannister* v. *Roberts*, 35 Me. 76; *Fake* v. *Eddy's Ex'r*, 15 Wend. 76), and an agreement to pay interest half-yearly, or quarter-yearly on a note payable a year after date, is valid and enforceable (*Mowry* v. *Bishop*, 5 Paige, 98; *Wilcox* v. *Howland*, 23 Pick. 167), though if nothing be said at the time as to the time when the interest is to be paid, the interest will not be payable until the principal is due, although the principal may be payable three years or more from the date of the note. *Cooper's Adm'r.* v. *Wright*, 3 Zabr. 200; *Buckman* v. *Bergholz*, 38 N. J. L. 531. A promissory note drawn payable on time with interest, bears interest from date. *Bogan* v. *Calhoun*, 19 La. Ann. 472; *Francis* v. *Castlemann*, 4 Bibb., 282. But one made payable during the whole of a given month does not bear interest until after the last day of the month. *Pollard* v. *Yoder*, 2 A. K. Marsh. 264. If a note be made payable on a day certain, with interest from date, if not punctually paid, interest from date would be recoverable if default be made. *Gully* v. *Remy*, 1 Blackf. 69; *Rumsey* v. *Matthews*, 1 Bibb, 242; *Alexander* v. *Troutman*, 1 Kelly, 469. A note on demand "with interest till paid," bears interest from the day of its execution. *Pate* v. *Gray*, 1 Hemp. 155. When a contract is to pay money by installments and the payments are to commence at a future time, "with interest," the interest begins to run from the making of the contract. *Conners* v. *Holland*, 113 Mass. 50. Where a note is payable in a given number of years, with interest from date, at a specified rate, such interest is not payable annually, but at the ma-

turity of the note. *Koehring* v. *Muemminghoff*, 61 Mo. 403; 21 Am. Rep. 402; *Bander* v. *Bander*, 7 Barb. 560; 5 How. 41.

Where money is lent, upon an agreement to be paid on a day certain, with lawful interest, payable at appointed times, the creditor cannot pay the principal before the appointed time, nor can he stop the interest by tendering the principal before that time; for the time is a part of the contract, and is made so for the benefit of the creditor. *Ellis* v. *Craig*, 7 Johns. Ch. 7.

Where there is a written contract to pay money or other thing on a day certain and the contract is broken, then interest is allowed by way of damage for the breach, as in the case of notes and bills of exchange (*Selleck* v. *French*, 1 Conn. 32); but the interest must be claimed in some form in the declaration. *DeGroot* v. *Darby*, 7 Rich. (S. C.) 121. But where a party agrees by note to pay a certain sum at the expiration of a year with interest on it at a rate named, which is higher than the customary one of the State or territory where he lives, and does not pay the note at the expiration of the year, it bears interest not at the old rate but at the customary or statute rate. *Burnhisel* v. *Firman*, 22 Wall. 170; *Newall* v. *Houlton*, 22 Minn. 19; *Ludwick* v. *Huntzinger*, 5 Watts & Serg. 51. And, when a note draws interest from date at a lower than the customary rate, but contains no stipulation as to interest after maturity, it is proper to allow interest by way of damages at the customary or statutory rate, after the maturity of the note. *Moreland* v. *Lawrence*, 23 Minn. 84. The judgment on a note can only include the legal rate of interest at the time of the execution of the note. *Roeder* v. *Brown*, 1 Wash. Terr. 130.

A note or bond payable without any time specified is in law payable immediately (*Sheehy* v. *Mandeville*, 7 Cranch, 208); and interest runs from the day of the date. *Francis* v. *Castleman*, 4 Bibb, 282; *Purdy* v. *Philips*, 1 Duer, 369; 11 N. Y. (1 Kern.) 406. But where a note or bond is payable on demand or on request, although it is suable at once, yet the debtor is not considered in default until demand is made, and therefore interest runs only from the time of a demand *in pais* or of suit brought, which is a judicial demand. *Selleck* v. *French*, 1 Am. L. Cas. 618; *Dodge* v. *Perkins*, 9 Pick. 369; *Breyfogle* v. *Beckley*, 16 Serg. & Rawle, 264; *Wells* v. *Abernethy*, 5 Conn. 222. And the promissory notes of a bank do not bear interest until demand and refusal. *Crawford* v. *Bank of Wilmington*, Phil. (N. C.) 136. The rule that interest runs from the time of the demand applies to a note payable on demand for money lent on the day of the date. *Schmidt* v. *Limehouse*, 2 Bailey, 276; *Pullen* v. *Chase*, 4 Pike, 210.

§ 12. **Interest on special contracts.** Interest is recoverable on money due under a special contract, as where compensation for services is agreed upon at a specific sum per month. *Still* v. *Hall*, 20 Wend. 51. And where a party sues to recover back the consideration he has advanced under a special contract, on the ground of a breach of the contract by the defendant, interest is computed, not merely from the time of the breach, but from the time the consideration was advanced, unless there are some special circumstances that render it inequitable. *Graham* v. *Estate of Chandler*, 38 Vt. 559. But an allowance of interest on a subscription in aid of a railroad from the date of the completion of the road, where the promise was to pay one year after its completion and nothing is expressed about interest, is error. *Stevens* v. *Corbitt*, 33 Mich. 458.

Upon a contract for the payment of money and for interest thereon by installments, but which is silent as to interest after the time specified for the payment of the principal, the creditor is entitled to interest after that time by operation of law and not by any provision of the contract. *Re Bartenbach*, 11 Bankr. Reg. 61; *Lash* v. *Lambert*, 15 Minn. 416; 2 Am. Rep. 142; *Cook* v. *Fowler*, L. R., 7 H. L. 27; 9 Eng. 17. So, too, in a note where a special rate of interest is agreed to be paid, the contract rate governs only to the maturity of the note, and after that, in the absence of any special contract, the rate fixed by law (*Pearce* v. *Henessy*, 10 R. I. 223; *Brewster* v. *Wakefield*, 22 How. [U. S.] 127); but if there be a special contract to pay at a certain rate "until the principal sum be paid," the contract rate governs even after maturity. *Lanahan* v. *Ward*, 10 R. I. 299; *Capen* v. *Crowell*, 66 Me. 282; *Hubbard* v. *Callahan*, 42 Conn. 524; 19 Am. Rep. 364; *Cordell* v. *First Nat. Bank of Kansas City*, 64 Mo. 600; *contra*, *Kent* v. *Bown*, 3 Minn. 347.

§ 13. **Interest on debts.** Interest is considered as incident, legally, to every debt certain in amount and payable at a certain time. It is now allowed in all cases where one person detains the money of another unjustly and against his will, and it is considered as a compensation for the damages sustained by the plaintiff in consequence of the defendant's breach of contract. *Obermyer* v. *Nichols*, 6 Binn. 159; *Crawford* v. *Willing*, 4 Dall. 286; *Davis* v. *Greeley*, 1 Cal. 422. After the maturity of a note with interest payable semi-annually, no installments of such interest will be considered as due, for both the principal and the accruing interest are due on every day until paid. *Wheaton* v. *Pike*, 9 R. I. 132; 11 Am. Rep. 227. And it is well settled that, where a conventional rate of interest may be stipulated for, the rate of interest provided for by the general law prevails after

the maturity of the debt. *Gray* v. *Briscoe*, 6 Bush (Ky.), 687; *Langston* v. *South Carolina R. R. Co.*, 2 S. C. 248.

Interest is not chargeable on book debts, except by virtue of special custom, or by agreement. *Crosby* v. *Mason*, 32 Conn. 482. Where the person contracts for a higher rate of interest than can at the time be lawfully contracted for, but the law in force at the time the remedy is sought against him allows parties to contract for such higher rate of interest, the latter law controls. *Klingensmith* v. *Reed*, 31 Ind. 389.

§ 14. **Interest as damages.** Where there is a written contract to pay money or other thing on a day certain, and the contract is broken, then interest is allowed by way of damage for the breach, as in the case of promissory notes, or of bills of exchange. *Selleck* v. *French*, 1 Conn. 32; *Adams* v. *Fort Plain Bank*, 36 N. Y. (9 Tiff.) 255; *Brackett* v. *Edgerton*, 14 Minn. 174; *Adams Express Company* v. *Milton*, 11 Bush (Ky.), 49. It is generally in the discretion of the jury to give interest in the name of damages; although it is not conformable to legal principles to allow it on unliquidated and contested claims, sounding in damages. *Willings* v. *Consequa*, Peters' C. C. 172. But interest is not allowable upon a sum named in an agreement, not as a penalty, but as liquidated damages, and recoverable not as the representative of an actual debt, or as the measure of actual compensation, but as the damages fixed by the parties, to be recoverable on the breach. *Hoagland* v. *Segur*, 38 N. J. L. 230.

In an action on the case to recover for an injury to property, resulting from the negligence of the defendant, it is proper to allow the plaintiff interest from the time the injury was done (*Chicago, etc., R. R. Co.* v. *Shultz*, 55 Ill. 421); at any rate, should he recover for the value of the property, he is entitled to interest thereon from the commencement of the action. *Chapman* v. *Chicago, etc., R. R. Co.*, 26 Wis. 295; 7 Am. Rep. 81; *Harris* v. *Delaware, etc., R. R. Co.*, 61 N. Y. (16 Sick.) 656. It is held in Missouri, that in actions *ex delicto* based upon simple negligence of a party to whom no pecuniary benefit could accrue by reason of the injury thereby inflicted, interest is not allowable. *Marshall* v. *Sahricker*, 63 Mo. 308.

In the absence of any express promise to pay interest, the law does not make a party liable for interest, till he is in default for not paying the principal. *Gay* v. *Gardiner*, 54 Me. 477. And in such case, after the principal of the debt has been paid, and received in full, no action can be maintained to recover interest; interest, in such cases, being a mere incident, cannot exist without the debt, and the debt being extinguished, the interest must necessarily be extinguished also. *Southern Central R. R. Co.* v. *Town of Moravia*, 61 Barb. 181.

Where one has received money for the use of another, and it was his duty to pay it over, interest is recoverable for the time of the delay. *Selleck* v. *French*, 1 Conn. 32; *Simpson* v. *Feltz*, 1 McCord's Ch. 213; *Shipman* v. *Miller*, 2 Root, 405; *Lynch* v. *De Viar*, 3 Johns. Cas. 303. See, also, *Youmans* v. *Heartt*, 34 Mich. 397. So, where commissioners retain money of a town, claiming it as their own, they are properly chargeable with interest on the amount so retained. *Griggs* v. *Griggs*, 56 N. Y. (11 Sick.) 504. But if the holder of the money of another is guilty of no neglect or delay, he will not be chargeable with interest. *Selleck* v. *French*, 1 Conn. 32; *Wood* v. *Robbins*, 11 Mass. 504; *Knight* v. *Reese*, 2 Dall. 182; *Bell's Adm'r* v. *Logan*, 7 J. J. Marsh. 593; *Taylor* v. *Knox's Ex'rs*, 1 Dana, 391.

Where money has been obtained by fraud and imposition, or in any wrongful manner, interest is chargeable from the time the money was so received. *Selleck* v. *French*, 1 Conn. 32; 1 Am. Lead. Cas. 633; *Winslow* v. *Hathaway*, 1 Pick. 211; *Goddard* v. *Bulow*, 1 Nott & McCord, 45. As if the money is the proceeds of the plaintiff's property tortiously sold by the defendant (*Chauncey* v. *Yeaton*, 1 N. H. 151); or has been received by the defendant in payment of a debt incurred at an illegal game from a person who, being the bailee of the plaintiff's money, fraudulently applied it to this purpose. *Mason* v. *Waite*, 17 Mass. 560.

On a covenant of seisin, of warranty, quiet enjoyment, or against incumbrances, the measure of damages is the consideration money, with interest; and where the purchaser is evicted by title paramount, the interest begins from the time when the consideration money was paid, or was payable, and bore interest; but where the eviction does not relate back, as in the case of an incumbrance, and the purchaser has been in the reception of profits that cannot be recovered from him, interest runs only from the eviction; and the consideration money is made the measure of damages, apparently because it expresses the value of the land at the time of the sale. *Pitcher* v. *Livingston*, 4 Johns. 1; *Wilson* v. *Spencer*, 11 Leigh, 261; *Hovey* v. *Newton*, 11 Pick. 421; *Herndon* v. *Venable*, 7 Dana, 371. But in estimating damages upon a breach of covenant of warranty, when the title fails as to part only of the premises, interest should be computed on the relative proportion of the purchase price. *Stark* v. *Olney*, 3 Oreg. 88.

Interest may be awarded by way of punitory damages for any fraud, delinquency or injustice done by a carrier to the owner of goods, as where the carrier of cotton by boat sold the covering, thereby exposing the cotton to the rain and other injuries, so that the cotton was greatly

damaged. *Wolfe* v. *Lacy*, 30 Tex. 349; *Chicago R. R. Co.* v. *Ames*, 40 Ill. 249.

The rule is that in actions sounding in damages the jury may allow interest, or not, in their discretion. *The Home Ins. Co.* v. *The Penn. R. R. Co.*, 11 Hun (N. Y.), 182; *Uhland* v. *Uhland*, 17 Serg. & R. 265; *Delaware Ins. Co.* v. *Delaunie*, 3 Binn. 295. And in an action for damages occasioned by a collision, the interest on the costs of repairing the injured vessel, and on her rental value while undergoing repairs, may be properly allowed as damages. *Mailler* v. *Express Propeller Line*, 61 N. Y. (16 Sick.) 312. In trover, and case, and trespass, when brought for the recovery of property converted or destroyed, the legal measure of damages is the value of the chattel, with interest from the time of the conversion or trespass (*Beals* v. *Guernsey*, 8 Johns. 446; *Johnson* v. *Sumner*, 1 Metc. 172) to the date of the verdict. *Shepard* v. *Pratt*, 16 Kans. 209.

In England it has been decided that interest ought to be allowed only where there is a written contract for the payment of money on a day certain; or where there has been an express contract, or where a contract can be presumed from the usage of trade, or the course of dealings between the parties, or where it can be proved that the money has been used, and interest actually made. *DeHaviland* v. *Bowerbank*, 1 Campb. 50; *DeBernales* v. *Fuller*, 2 Camp. 426. Interest has been refused in actions for money obtained by fraud (*Crockford* v. *Winter*, 1 Campb. 129); for money received to the plaintiff's use (*DeBernales* v. *Fuller*, 2 Campb. 426); for goods sold and delivered payable at a certain time (*Gordon* v. *Swan*, 2 Campb. 429, n.); and on liquidated accounts, and on policies of insurance. *Kingston* v. *McIntosh*, 1 Campb. 518. See *Selleck* v. *French*, 1 Conn. 32.

§ 15. **Interest as against executors, etc.** As a general rule, administrators or executors, in the character of administrators, are not chargeable with interest, except where they have received interest, or used the money, or retained it unreasonably after they ought to pay it out to claimants, or to account to the court. *Wyman* v. *Hubbard*, 13 Mass. 232; *The State* v. *Mayhew*, 4 Halst. (N. J.) 70; *Turney* v. *Williams*, 7 Yerger, 173; *Allen* v. *Hardee*, 30 Ga. 463. Where a legacy is directed to be paid within one year after the testator's death, and there was no hand to receive it for thirteen years, the executor was charged with the interest. *Lyons* v. *Magagnos*, 7 Gratt. 377. Or where the settlement and final confirmation of an executor's account were delayed by litigation five years, he was chargeable with interest on the balance due at the time of filing it. It was his duty to invest it, or ask the direction of the court. *Bruner's Appeal*, 57 Penn. St. 46. But where an ad-

ministrator has made application to the court for an order to lend out money belonging to the estate, and the application has been refused, the administrator cannot thereafter be charged with interest on the money. *Ex parte Walsh*, 26 Md. 495. Where a will requested an executor to raise two minor legatees, using the interest on their legacies as far as it would go in so doing, he is not chargeable with interest on their legacies until he ceases to provide for them. *Boyd* v. *Gault*, 3 Bush (Ky.), 644. But where a sum is to be invested at a certain specified time, it must be considered as invested at that time, and the party for whom it was to be invested is entitled to interest thereon from that time. *Halstead* v. *Mecker's Ex'rs*, 3 C. E. Green (N. J.), 136.

When the distributees elect to charge the administrator with the rents and hire of the estate, he is also chargeable with interest on the value of such rents and hire, from the date of their maturity. *Harrison* v. *Harrison*, 39 Ala. 489. And an administrator, who, through maladministration, becomes chargeable with debts due the estate, is also chargeable with the interest thereon accrued. *Banks* v. *Machen*, 40 Miss. 256.

Upon a bill against an executor for an account, he may be charged with interest, if otherwise proper, although the bill contains no prayer for interest. *Blogg* v. *Johnson*, L. R., 2 Ch. App. 225.

§ 16. **Interest against estates of deceased persons.** Without special circumstances an administrator is not entitled to interest on moneys advanced by him on account of the estate of the intestate. *Storer* v. *Storer*, 9 Mass. 37. At least, interest will not be allowed when there are funds which might have been made subject to the control of the administrator. *Evarts* v. *Nason's Estate*, 11 Vt. 122. Under special circumstances, when the administrator has not been guilty of unreasonable delay, and the advance of money has been meritorious and beneficial to the estate, he will be allowed interest. *Rix* v. *Smith*, 8 Vt. 365; *Liddel* v. *Mc Vickar*, 6 Halst. 44; *Jennison* v. *Hapgood*, 10 Pick. 79.

Interest may be awarded on the amount claimed against the estate of a deceased person, although not called for in the notice presented to the administrator. *Harwood* v. *Larramore*, 50 Mo. 414. But where one enters into the service of another, without any agreement as to the length of the term, or the compensation, the termination of the employment by the death of the master, gives no right to the servant as against the estate of the deceased, to interest on the balance unpaid at the termination of the employment. Interest is not allowable until the accounts are settled. *Smith* v. *Velie*, 60 N. Y. (15 Sick.) 106.

An advancement which, by the will of a testator, is to go in diminution of the share of the estate of the one to whom the advancement is made, bears interest from the time of the probate of the will. *Verplanck* v. *De Went*, 10 Hun (N. Y.), 612. See *Cabells* v. *Puryear*, 27 Gratt. 902.

§ 17. **Interest as against guardians.** A guardian is a trustee to invest, or to pay over, as the case may be; and as to interest, simple or compound, he is subject to the same rule that trustees are. *Ryan* v. *Blount*, 1 Dev. Eq. 382; *Spack* v. *Long*, 1 Ired. Eq. 426; *Hughes* v. *Smith*, 2 Dana, 257. As to the rule of interest for trustees, see the next section.

When a guardian receives sums free from all claims, and that are large, compared with the current expenditures of the estate, he will be charged with interest thereon from a reasonable time after such receipt. *Adams* v. *Lathan*, 14 Rich (S. C.) Eq. 304; *Bond* v. *Lockwood*, 33 Ill. 212. But he is not liable to be charged with compound interest, unless he is guilty of such gross neglect in the execution of his trust as is evidence of fraud, and a failure to make annual settlements is not evidence of fraud. *Calhoun* v. *Calhoun*, 41 Ala. 369.

§ 18. **Interest as against trustees.** The authorities do not establish that a trustee is to pay interest, solely for the reason that he deposits the trust moneys with his own; nor because he makes use of them more or less in his own business. There must be superadded to this either a breach of trust, or a neglect or refusal to invest the fund at the time or in the mode which the trust instrument, or the law itself has pointed out. In the case where the trustee has made use of the funds, but no such breach of trust is shown, he may be charged with interest, if it be proved that he has made interest. *Rapalje* v. *Norsworthy's Exrs.*, 1 Sandf. Ch. 399. See *McNair* v. *Ragland*, 1 Dev. Eq. 517; *Sparhawk* v. *Buell's Admr.*, 9 Vt. 42, 82. If there is a trust to invest, or to receive and pay over, and the trust is not performed, through mere neglect, simple interest only is chargeable; but for an intentional violation of duty, and a corrupt use of the money in the business of the trustee, compound interest will be charged; or, according to the circumstances of the case, rests will be made. *Schieffelin* v. *Stewart*, 1 Johns. Ch. 620; *Harland's Accounts*, 5 Rawle, 323; *Rowan* v. *Kirkpatrick*, 14 Ill. 10; *Montjoy* v. *Lashbrook*, 2 B. Mour. 261; *Fall* v. *Simmons*, 6 Ga. 265. But where a trustee has violated his trust, a party interested in the trust, who delays many years to bring suit for the recovery of the trust property, without showing any reason therefor, will only be allowed interest from the commencement of the suit. *Brinkley* v. *Willis*, 22 Ark. 1.

An assignee for the benefit of creditors who keeps the trust funds mingled with his own private funds, on deposit at a bank without any separate account of them, is chargeable with interest thereon at the usual rate. *Duffy* v. *Duncan*, 35 N. Y. (8 Tiff.) 187. And where a trustee fails to execute a trust to invest money for the maintenance of an infant during minority, and to accumulate the surplus income of the investments, equity will charge interest against him with rests, though he may not have used the trust money, and independent of any question of intention. *King* v. *Talbot*, 50 Barb. 453; 40 N. Y. (1 Hand) 76. See *Leitch* v. *Wells*, 48 N. Y. (3 Sick.) 585.

A depositor in a National bank, when it suspends payment, and a receiver is appointed, is entitled, from the date of his demand, to interest upon his deposit. *Nat. Bank, etc.*, v. *Mechanics' Nat. Bank*, 94 U. S. (4 Otto) 437.

§ 19. **Demand, interest from time of.** The general rule is that in an action for goods sold and delivered, or services rendered, in account, where no express term of credit is proved, interest will be allowed from the time of a demand, or presentment of the account, or of the commencement of the suit, and not for any earlier period. *Barnard* v. *Bartholomew*, 22 Pick. 291; *Amee* v. *Wilson*, 22 Me. 116; *Second Street*, 66 Penn. St. 132. And it is held in Massachusetts that the rule applies in an action for money had and received. *Ordway* v. *Colcord*, 14 Allen, 59. Interest on a claim for services may be allowed without proof of a demand, when the debtor, by leaving the State, and having no fixed abode, prevented the creditor from making a demand. *Graham* v. *Chrystal*, 2 Abb. (N. Y.) App. 263; 2 Keyes, 21.

Interest may be recovered upon the amount of an award, after the same is due and after demand, under the common counts, although the declaration contains no count for interest. *Tucker* v. *Page*, 69 Ill. 179. A legacy charged on lands yielding profits carries interest from the time it becomes payable, even though no demand is made at that time. *Keech* v. *Speakman*, 1 Penn. L. J. 72. But in a winding up proceeding against a banking company, interest will not be allowed on its notes payable on demand, when no demand had been made before the proceedings commenced. *In re Herefordshire, etc., Co.*, L. R., 4 Eq. 250.

Where money is paid to one, who receives it, believing that it is his due, he is not liable for interest upon it before demand made, and refusal to pay, nor until he shall have reason to be satisfied that he ought to repay it, and shall know to whom he should pay it. *Ashhurst* v. *Field*, 28 N. J. Eq. 315; *King* v. *Diehl*, 9 Serg. & R. 409, 422.

Interest on damages awarded for laying out a highway over the

plaintiff's land may be recovered from the time of the demand. *Clough* v. *Unity*, 18 N. H. 75.

§ 20. **Judicial demand of interest.** Where a note or bond is payable on demand, or on request, although it is suable at once, yet the debtor is not considered in default until demand is made; hence interest runs only from the time of a demand in fact, or of suit brought, which is a judicial demand. *National Lancers* v. *Lovering*, 10 Fost. 511; *Dodge* v. *Perkins*, 9 Pick. 369; *Breyfogle* v. *Beckley*, 16 Serg. & Rawle, 264; *Ringo* v. *R. E. Bank*, 13 Ark. (8 Eng.) 584.

A plaintiff is entitled to receive interest on the amount of a verdict from the date of the judicial demand. *Murison* v. *Butler*, 18 La. Ann. 296. But in an action of trespass interest can only be allowed from the date of the judgment liquidating the damages, and not from the date of the judicial demand. *Robertson* v. *Green*, 18 La. Ann. 28.

§ 21. **Interest on verdicts.** If no delay has been created by the defendant, no interest is allowed on verdicts. *The People* v. *Gaine*, 1 Johns. 343; *Pawling's Adm'r* v. *Sartin*, 4 J. J. Marsh. 238; *Blickenstaff* v. *Perrin*, 27 Ind. 527. But where delay has been made by the defendant, as by proceedings to obtain a new trial, if the original cause of action was a contract carrying interest, interest on the amount of the verdict till the entry of judgment or taxation of costs will be allowed (*Vredenburg* v. *Hallett*, 1 Johns. Cas. 27; *Vail* v. *Nickerson*, 6 Mass. 262); but not in an action of tort, not even, it is said, in trover. *Henning* v. *Van Tyne*, 19 Wend. 101. But this doctrine is questioned in *Bissell* v. *Hopkins*, 4 Cow. 53. See, too, *Atherton* v. *Fowler*, 46 Cal. 320. Interest should be added to the amount of a verdict from the time the judgment ought to be entered, and not from the date of the verdict. *Shephard* v. *Brenton*, 20 Iowa, 41.

§ 22. **Interest on judgments.** Interest is incident at law to judgments (*Gwinn* v. *Whitaker*, 1 Harr. & Johns. 754; *Tazewell* v. *Saunders*, 13 Gratt. 368); but not as to costs unless actually paid, and then from the date of payment. *Rogers* v. *Burns*, 27 Penn. St. 528. But, independently of statutes, the only remedy by which it can be recovered is an action of debt on the judgment, in which way it can be recovered as damages for the detention, from the time of the entry of the judgment. *Sayre* v. *Austin*, 3 Wend. 496; *Hodgdon* v. *Hodgdon*, 2 N. H. 169; *William's Adm'r* v. *American Bank*, 4 Mete. 317. The rule applies even where the judgment is that of a justice of the peace of another State. *Mahurin* v. *Bickford*, 6 N. H. 568. And interest will be allowed at the legal rate of the State where it is claimed, in the absence of proof of the existence of a different legal rate in the State where the judgment was rendered. *Deem* v. *Crume*,

46 Ill. 69. The rule applies, too, where the original judgment was for a cause of action that does not bear interest, as for unliquidated damages (*Klock* v. *Robinson*, 22 Wend. 157; *Marshall* v. *Dudley*, 4 J. J. Marsh. 244); or where the action was for a penalty, and the judgment with the interest exceeds the penalty. *Smith* v. *Vanderhorst*, 1 McCord (S. C.), 328.

A judgment can properly bear interest only from the time of its date. *Bibend* v. *Liverpool, etc., Ins. Co.*, 30 Cal. 78. A judgment for a penalty in the United States district court bears interest. *Booth* v. *Ableman*, 20 Wis. 602. But where both parties to a suit appeal from a decree of a district court awarding to a libellant a sum of money as salvage, and the decree is sustained unchanged in the appellate court, the libellant is not entitled to interest on the sum awarded from the date of the decree in the district court. *The Rebecca Clyde*, 12 Blatchf. 403.

Interest on a judgment on land sold by the sheriff will not be allowed later than the day of sale. *Bachdell's Appeal*, 56 Penn. St. 386.

Where the creditor voluntarily discharges his debtor from imprisonment, and afterward brings an action of debt on a judgment against him, he is not entitled to interest thereon during the time the debtor was imprisoned. *Dennison* v. *Slason*, 39 Vt. 606.

§ 23. **Interest on executions.** At common law, on an execution on a judgment, interest cannot be levied, because the execution must pursue the judgment, and there is nothing in the record to authorize the collection of interest. *Watson* v. *Fuller*, 6 Johns. 283. But in the case of a bond with a penalty, the interest due on the bond will be allowed. *Thomas* v. *Wilson*, 3 McCord, 166. As a consequence of the right to levy execution only for the judgment and not for the interest, a judgment is a lien on land only for the principal amount and not for interest on it. *Mower* v. *Kip*, 6 Paige, 89. But interest on a judgment is now allowed by statute in most States.

§ 24. **Interest, suspension of.** Interest is not allowed during the time a right of action is suspended by war. *Selden* v. *Preston*, 11 Bush (Ky.), 191; *Mayer* v. *Reed*, 37 Ga. 482. But as it is the duty of the debtor to seek his creditor and pay his debt, he must show that the failure to pay was not the result of his neglect. *Pillow* v. *Brown*, 26 Ark. 240. As to the accruing of interest on debts due by a citizen of a loyal State to a citizen of one of the confederate States during the recent civil war—see *Bigler* v. *Waller*, Chase's Dec. 316.

Where a bond, given by one residing in the Union lines during the rebellion, was payable within said lines to the authorized agent of

the creditor, who resided within the confederate lines, the interest was not suspended. *Ward* v. *Smith*, 7 Wall. (U. S.) 447. And where the holder of a promissory note in Maryland parted with the note before it fell due, and entering the confederate army did not return to the State until after the war, and then became repossessed of the note which long before had fallen due, the maker during the whole time continuing a citizen of the State, the holder is entitled to recover interest during the war. *Thomas* v. *Hunter*, 29 Md. 406. But it is held in a recent case in Virginia that where during the rebellion a creditor resided within the territory of the belligerent powers, and his debtor within that of the other of said powers, such debtor would, under the rules of public law, be entitled to an abatement of interest during the time the war lasted. *Roberts* v. *Cocke*, 28 Gratt. 207. And see *McVeigh* v. *Bank of Old Dominion*, 26 id. 188. So it was held by the supreme court of the United States, that interest on loans made previous to, and maturing after the commencement of the war, ceased to run during the subsequent continuance of the war, although interest was stipulated in the contract. *Brown* v. *Hiatts*, 15 Wall. 77. See, also, *Fred* v. *Dixon*, 27 Gratt. 541; *Walker* v. *Beauchler*, id. 511.

The payment of interest is not arrested by notices from each one of two partners requesting the debtor not to pay to the other any moneys due the partnership. *King* v. *Kelley*, 51 Penn. St. 36.

§ 25. **Interest, when barred.** Where interest is made payable by the terms of a contract, its collection can be enforced after the principal of the debt has been paid; but where it is allowed, not as a part of the contract, but as an incident and in lieu of damages, or as compensatory for some loss by reason of a breach or default, no action will lie to recover interest after payment of the principal of the debt and its receipt in full, it being extinguished with the debt. *Ludington* v. *Miller*, 6 J. & Sp. (N. Y.) 478; *Southern Central R. R. Co.* v. *Moravia*, 61 Barb. 180. But where collateral security is given, by bond and mortgage, drawing interest, for an indebtedness of a larger amount, it is fairly inferable that the parties intended that the interest should accumulate to cover the deficiency, and the payment of interest on the principal debt will not necessarily extinguish the interest upon the collaterals. *Cory* v. *Leonard*, 56 N. Y. (11 Sick.) 494; 1 N. Y. Sup. (T. & C.) 183.

§ 26. **Tender, its effect upon interest.** A tender, so far as the compatation of interest is concerned, must be considered as a payment. *Hidden* v. *Jordan*, 39 Cal. 61; *Davis* v. *Parker*, 14 Allen (Mass.), 94; *Raymond* v. *Bearnard*, 12 Johns. 274. And see *Vandergrift's Appeal*, 80 Penn. St. 116; *Rooney* v. *Dubuque Co.*, 44 Iowa, 128. But

the tender of a less sum than the amount due will not stop interest on that money. *Shobe* v. *Carr*, 3 Munf. 10. And the tender, in order to be availing, must be followed up, and the money brought into court. *Hamlett* v. *Tallman*, 30 Ark. 505. An offer to pay on a reasonable condition, such as the giving up of the security, and a tender after action brought, will stop interest if the debtor does not afterward use the money. *Dent* v. *Dunn*, 3 Campbell, 296; *Suffolk Bank* v. *Worcester Bank*, 5 Pick. 106.

When the purchaser tendered the purchase-money for a tract of land, and demanded a deed in pursuance of the contract, but the vendor was unable at the time to make the title, and did not take the money, it was held that he could not charge the purchaser with interest from the date of the tender until the title was made. *William* v. *Willhite*, 3 Head (Tenn.), 344. So an offer by the maker of a promissory note to pay the sum due thereon, upon a restrictive condition which the holder refuses, or is not in a situation to fulfill, is sufficient to stop the running of interest. *Haywood* v. *Hartshorn*, 55 N. H. 476.

In a suit for the specific performance of a contract to convey land, the defendant is not entitled to interest on the purchase-money which has been tendered and refused, from the date of the tender, unless he proves that the plaintiff has used it. *Hunter* v. *Bales*, 24 Ind. 299. But where a vendee, apprehending no danger as to the title to the land, made a formal tender, not in good faith, but for an unreasonable advantage, and subsequently used the money tendered, as well as the land for which he owed it, he is not entitled to exoneration of interest. *Nantz* v. *Lober*, 1 Duv. (Ky.) 304.

§ 27. **Compound interest.** As a mere incident to interest, new interest is not allowed. *Stokeley* v. *Thomson*, 34 Penn. St. 213; *Wilson* v. *Davis*, 1 Mon. T. 183. It cannot be allowed where there is no special agreement incorporated in a contract or stipulated between the parties. *Young* v. *Hill*, 67 N. Y. (22 Sick.) 162; *Stoner* v. *Evans*, 38 Mo. 461; *Doe* v. *Vallego*, 29 Cal. 385; *Van Husan* v. *Kanouse*, 13 Mich. 303; *Banks* v. *McClellan*, 24 Md. 62. But an agreement to pay interest on interest is not usurious nor illegal (id.; *Dow* v. *Drew*, 3 N. H. 40; *Guernsey* v. *Rexford*, 63 N. Y. [18 Sick.] 631), although parties should not *prospectively* agree that interest shall bear interest. *Gunn* v. *Head*, 21 Mo. 433. Without a special agreement compound interest is only allowed in case of gross delinquency, or intentional violation of duty. *Bennett* v. *Cook*, 2 Hun, 526; 5 N. Y. Sup. (T. & C.) 526; *Rayner* v. *Bryson*, 29 Md. 473.

A note due to a guardian bears compound interest up to the time the ward arrives at full age, and thereafter simple interest upon the whole

amount, principal and interest, due at said date. *Little* v. *Anderson*, 71 N. C. 190; *Payne* v. *King*, 38 Mo. 502.

In Texas, where a contract stipulates for interest annually, interest runs on the annual interest as it accrues. *Lewis* v. *Paschal*, 37 Tex. 315.

A contract made in California, to pay monthly 2½ per cent interest and to compound it, although lawful under the *lex loci*, is unconscionable and deceptive and will not be enforced by a court of law in Pennsylvania. *Lime* v. *Norris*, 8 Phil. (Penn.) 84.

§ 28. **Payments, interest on, how computed.** Where partial payments have been made on a note, or other claim bearing interest, interest is to be computed on the principal sum from the time when the interest commenced, to the first time when a payment was made, which alone, or taken in conjunction with preceding payments, if any, exceeds the interest at that time due. Then add this interest to the principal and from the sum subtract the payment made at that time together with preceding payments, if any. The remainder forms a new principal, on which to compute and subtract interest as upon the first principal, and the computation should proceed in the same manner to the time of payment or judgment. *Pierce* v. *Faunce*, 53 Me. 351; *Markel's Admr.* v. *Spitler's Admr.*, 28 Ind. 488; *Heartt* v. *Rhodes*, 66 Ill. 351; *Curd* v. *Davis*, 1 Heisk. (Tenn.) 574; *Den's Estate*, 35 Cal. 692. But where, by the terms of a written contract, payments become due on a certain day in each month, it is proper to allow interest on such sum as may be due on the specified day, from that time until paid. *Dobbins* v. *Higgins*, 78 Ill. 440. Upon a contract to pay a sum in installments, the payments to begin at a future time "with interest," the interest begins to run from the making of the contract. *Conners* v. *Holland*, 113 Mass. 50. In mutual accounts, interest is to be cast on the annual balance. *Davis* v. *Smith*, 48 Vt. 53.

Where there is an agreement to pay money, but no time is limited for the payment, interest is payable from the time when the money becomes due (*Ruckman* v. *Bergholz*, 38 N. J. L. 531), and interest is chargeable from the time money was wrongfully obtained, and not merely from the time of demand. *Atlantic Nat. Bank* v. *Harris*, 118 Mass. 147; *Robbins* v. *Laswell*, 58 Ill. 203.

Partial payments made upon a debt drawing interest should be first applied in payment of the interest, and afterward to the reduction of the principal. *Spires* v. *Hammet*, 8 Watts & S. 18; *Smith* v. *Shaw*, 2 Wash. (C. C.) 167; *Mills* v. *Saunders*, 4 Brown (Neb.), 190.

§ 29. **Law of place and its effect.** If a promissory note, dated in one State and made payable in another, contains no stipulation as to

the rate of interest, the rate will be determined by the law of the State where it is made payable (*Howard* v. *Branner*, 23 La. Ann. 369); and in a suit upon an open account or note created in a foreign country, if the plaintiff fail to allege and prove the legal rate of interest in that country, the rate of interest allowed by law in the State where the remedy is sought will govern. *Pauska* v. *Daus*, 31 Tex. 67; *Booty* v. *Cooper*, 18 La. Ann. 565. But this general rule must be understood as applicable to those contracts only in which the parties have failed to make any stipulation as to the rate of interest. *Bolton* v. *Street*, 3 Cold. (Tenn.) 31.

Where interest is allowed not under contract, but by way of damages, the rate must be according to the *lex fori*. *Goddard* v. *Foster*, 17 Wall. 123. And where there is no statute where the transaction takes place, interest at a reasonable rate, and according to the customs which obtain in the community in dealings of the same character, will be allowed. *Young* v. *Godbe*, 15 Wall. 562.

Interest or damages for the non-payment of bonds at maturity is to be computed by the laws of the State where the same and the mortgage to secure them were executed and the parties resided, if no provision is made for payment elsewhere, although the mortgage is upon real estate in another State. *Kavanagh* v. *Day*, 10 R. I. 393; 14 Am. Rep. 691; *Chase* v. *Dow*, 47 N. H. 405. Or they may draw the rate of interest of the State where the security is situate. *Lewis* v. *Ingersoll*, 3 Abb. (N. Y.) App. Dec. 55; 1 Keyes, 347.

A mortgage and note drawing 12 per cent interest, executed in a State where such rate of interest is allowed by law, is valid in the State where executed, although made payable in a State in which such a rate would render it usurious. *Fisher* v. *Otis*, 3 Pinn. (Wis.) 78; 3 Chand. 83; *Kilgore* v. *Dempsey*, 25 Ohio St. 413.

Interest is allowed upon a foreign judgment where a recovery is had upon it in another State. *Mahurin* v. *Bickford*, 6 N. H. 567.

The legal rate of interest of one State is not presumed to be within the knowledge of the courts of another State, but it must be proved like any other fact. *Richardson* v. *Williams*, 2 Port. 239. And the court cannot, without the intervention of a jury, to find the rate of interest, render judgment for interest on a note made and payable in another State. *Pawling* v. *Sartain*, 4 J. J. Marsh. 238; *Hunt* v. *Mayfield*, 2 Stew. 124; *Russell* v. *Shepherd*, Hardin, 48.

The *lex loci* is to govern on the question whether interest is to be allowed upon a merchant's account. *Cocke* v. *Conigmaker*, 1 A. K. Marsh. 254; *Courtois* v. *Carpentier*, 1 Wash. C. C. 376.

CHAPTER LXXXIV.

INTERPLEADER.

TITLE I.

OF INTERPLEADER IN GENERAL.

ARTICLE I.

NATURE AND OBJECT OF THE REMEDY.

Section 1. In general. Interpleader is the remedy given to a person standing in the position of a mere stakeholder, against whom two or more persons severally make claim to the same thing, under different titles or in separate interests; and who, not knowing to which of the claimants he ought of right to render the debt or duty claimed, or to deliver the property in his custody, is either molested by an action or actions brought against him, or fears that he may suffer injury from the conflicting claims of the parties; and who, therefore, applies to the court, not only to protect him from being compelled to pay or deliver the thing claimed to both the claimants, but also from the vexation attending upon the suits, which are or may be instituted against him, upon the deposit in court of the thing claimed. *Bedell* v. *Hoffman*, 2 Paige, 199; *Hodges* v. *Griggs*, 21 Vt. 280; *Farley* v. *Blood*, 30 N. H. 354; *Union Bank* v. *Kerr*, 2 Md. Ch. 460; *Cornish* v. *Tanner*, 1 Y. & J. 333; *Laing* v. *Zedeu*, L. R., 9 Ch. 736; *Desborough* v. *Harris*, 5 DeG., M. & G. 439; *Nelson* v. *Barter*, 2 H. & M. 334; *Atkinson* v. *Manks*, 1 Cow. 691, 703; *Goddard* v. *Leech*, Wright (Ohio), 476; *Strange* v. *Bell*, 11 Ga. 103; *Burton* v. *Black*, 32 Ga. 53.

§ 2. **Interpleader at common law.** The remedy by interpleader was recognized at common law, but its application was restricted to the case where there was a joint bailment by both claimants (*Crawshay* v. *Thornton*, 2 Myl. & Cr. 1, 21); or to the case where a chattel had come to a man's possession by accident, or by finding, and he was sued in *detinue* by different persons, each claiming to be the owner in severalty.

The depositary might then plead the facts of the case, and pray that the plaintiffs in the several actions might interplead with each other. Id.; 3 Reeves' Eng. Law, 250, 448. The remedy, being principally confined to actions of *detinue*, afforded very imperfect relief in a great variety of cases, and is of little or no practical advantage in modern times, since the action of *detinue* is but seldom resorted to in any case. See *ante*, Vol. 2, pp. 529, 530.

§ 3. **Interpleader as an equitable remedy.** The proper remedy, therefore, of a person sued, or who is in danger of being sued, by several claimants of the same property, is to file a bill to compel them, by the authority of a court of equity, to interplead, either at law or in equity. *Farley* v. *Blood*, 30 N. H. 363. That in such cases the protection of the court ought to be extended upon principles of a most obvious equity, which require that the claimants should be compelled to interplead and settle the contest between themselves, without involving the plaintiff in a dispute in which he is not interested to any greater extent than as a mere stakeholder. *Langston* v. *Boylston*, 2 Ves. Jr. 109; *Angell* v. *Hadden*, 15 id. 245; *Glyn* v. *Duesbury*, 11 Sim. 147. And an interpleader will be sustained whenever it is necessary for the protection of a person from whom several others claim, legally or equitably, the same thing, debt, or duty, but who has incurred no independent liability to any of them, and does not himself claim an interest in the matter. *Cady* v. *Potter*, 55 Barb. 463; *Barry* v. *Mut. Life Ins. Co.*, 53 N. Y. (8 Sick.) 536. See, also, *Perkins* v. *Trippe*, 40 Ga. 225. A party, holding a fund in which he has no interest, and to which adverse claims are set up, will not be compelled to stand an action at law brought by either party, even under a promise of indemnity from the other. Nor will he be obliged to exercise any judgment on the subject of the conflicting rights of the parties, when one threatens or commences a suit and the other forbids payment. *Bleeker* v. *Graham*, 2 Edw. Ch. 647. He may file the bill before he is actually sued. *Farley* v. *Blood*, 30 N. H. 363; *Richards* v. *Salter*, 6 Johns. Ch. 445.

The filing of bills of interpleader ought not, however, to be encouraged, while there are other means of adjusting conflicting claims with safety to the stakeholder. *Bedell* v. *Hoffman*, 2 Paige, 199; *Greene* v. *Mumford*, 4 R. I. 313. And, in general, where the case presented by the bill praying relief by interpleader is not a claim by different parties to the same fund or assets in the hands of the complainant, for which he has a right to ask them to discharge him and interplead between themselves, such relief will be denied. *Leddel* v. *Starr*, 20 N. J. Eq. 274.

So, generally speaking, a bill of interpleader ought to be filed before or immediately after the commencement of proceedings at common law, and should not be delayed until after a verdict or judgment has been obtained. *Cornish* v. *Tanner*, 1 Younge & J. 333; *Union Bank* v. *Kerr*, 2 Md. Ch. 460; *Yarborough* v. *Thompson*, 3 Sm. & M. (Miss.) 291. It is, however, no objection to a bill of interpleader that it is filed after verdict at law, if the effect of the action at law was merely to ascertain the damages due on the claim of the plaintiff who was a defendant in the equity suit. *Hamilton* v. *Marks*, 5 DeG. & S. 638; 19 Eng. Law & Eq. 321. And see *Griggs* v. *Thompson*, 1 Ga. Dec. 146.

ARTICLE II.

FACTS ESSENTIAL TO SUSTAIN A RIGHT TO THE REMEDY.

Section 1. Applicant for relief must be disinterested. The first and most essential fact to be established in order to show the right of the party seeking relief to the remedy furnished by interpleader is, that such party claims no interest in or to the property or thing in dispute. *Hathaway* v. *Foy*, 40 Mo. 540. And where it appears that the party seeking the remedy claims an interest in, or a portion of, the fund in dispute, relief by interpleader cannot be granted. *Moore* v. *Usher*, 7 Sim. 384; *Jacobson* v. *Blackhurst*, 2 J. & H. 486; *Wakeman* v. *Dickey*, 19 Abb. 24; *Lincoln* v. *Rutland, etc., R. R. Co.*, 24 Vt. 639; *Hathaway* v. *Foy*, 40 Mo. 540; *Howe Machine Co.* v. *Gifford*, 66 Barb. 599; *Adams* v. *Dixon*, 19 Ga. 513; *Greene* v. *Mumford*, 4 R. I. 313. Thus, while an auctioneer may compel a vendor, who claims the deposit money received at the sale of his property, to interplead with the vendee who claims its return, he cannot obtain this remedy while he himself claims to deduct his commissions from the deposit in question. *Bignold* v. *Audland*, 11 Sim. 24; *Blecker* v. *Graham*, 2 Edw. Ch. 647. So, if any party seeking this relief has in any way lent himself to further the claims of either party to the fund in controversy, or to aid one in obtaining the possession thereof, to the exclusion of the other, he will have such an interest in relation to the subject-matter of the dispute as will justify a denial of the relief sought. *Marvin* v. *Ellwood*, 11 Paige, 365.

It is, however, no objection to a bill of interpleader, that the complainant has an interest in respect of other property not in the suit, but which might be litigated, that one party rather than another should succeed in the interpleader, so as to increase his own chance of success

in respect to such other property. Such interest may be termed an interest in the question, but not in the particular suit, and does not prevent one from filing an interpleader. *Oppenheim* v. *Wolf*, 4 N. Y. Leg. Obs. 259; S. C., 3 Sandf. Ch. 571.

In every case of interpleader, the court, in order to prevent its proceedings from being made the instrument of delay, or being used collusively, requires the complainant to file an affidavit that there has been no collusion between him and the other parties. *Stevenson* v. *Anderson*, 2 Ves. & B. 410; *Mt. Holly, etc., Turnpike Co.* v. *Ferree*, 2 C. E. Green (N. J.), 117; *Starling* v. *Brown*, 7 Bush (Ky.), 164. See, also, *Manby* v. *Robinson*, L. R., 4 Ch. App. 347; and, also, to bring the money or thing claimed into court; or, at least, that he should offer to do so by the bill. *Atkinson* v. *Manks*, 1 Cow. 691; *Farley* v. *Blood*, 30 N. H. 354; *Williams* v. *Wright*, 20 Tex. 499; *Dorn* v. *Fox*, 61 N. Y. (16 Sick.) 264, 268; *Williams* v. *Walker*, 2 Rich. (S. C.) 291. But see *Nash* v. *Smith*, 6 Conn. 421.

§ 2. **No adequate remedy at law.** Interpleader being an equitable remedy, it cannot be maintained in any case where the party seeking it has another plain and adequate remedy in the nature of an action at law. *Oil Run Petroleum Co.* v. *Cady*, 6 W. Va. 525; *Dry Dock, etc., Church* v. *Carr*, 3 Barb. 60. In other words, if the party can in any way exonerate himself from all liability in respect to the funds in his hands without filing a bill of interpleader, then he should not invoke that remedy. *McDonald* v. *Allen*, 37 Wis. 108; S. C., 19 Am. Rep. 754. Indeed, as a rule an interpleader cannot be sustained even when another plain and adequate remedy has been given by statute, since the remedy given by statute is generally considered as a *legal* remedy, in contradistinction to an *equitable* remedy. *Board of Education* v. *Scoville*, 13 Kans. 1. But the remedy given by statute may sometimes be an equitable remedy, and when it is, then it does not supersede some other previously existing equitable remedy unless it has been expressly so enacted, but the second remedy is merely cumulative, and the two remedies are in effect concurrent. Id.

§ 3. **Must be ignorant of the rights of claimants.** It is likewise essential to the rights of interpleader, that the person standing in the position of a stakeholder is ignorant of the rights of the different claimants to the fund held by him, or at least, that there is some doubt as to which of them is entitled to the fund, so that he cannot safely pay it to either. *Bell* v. *Hunt*, 3 Barb. Ch. 391; *Strange* v. *Bell*, 11 Ga. 103. Where two persons sue for the same debt or duty, and the defendant is ignorant of their respective rights, it is a proper case for an interpleader. *Dreyer* v. *Rauch*, 3 Daly, 434; 42 How. 22;

10 Abb. (N. S.) 243. And if the party seeking relief has acknowledged a title in one of the claimants, and has thus incurred a separate liability to him, the remedy by interpleader will be denied. *Crawshay* v. *Thornton*, 2 Myl. & Cr. 1.

So, there are cases where a party seeking to compel others to interplead will be estopped from alleging his ignorance of the rights of all the claimants, and in such cases the remedy will be denied. Thus, a *bona fide* purchaser of goods will not be allowed to indirectly deny the title of his vendor by seeking to compel him, when demanding payment or return of the goods, to interplead with a stranger who makes a similar demand on the ground that the goods were originally obtained from him through fraud. *Trigg* v. *Hitz*, 17 Abb. (N. Y.) 436. And see *Johnston* v. *Lewis*, 4 Abb. (N. S.) 150; *Shehan* v. *Barnett*, 6 T. B. Monr. (Ky.) 592. And upon the same principle, a tenant will not be permitted to deny the title of his landlord, nor can he interplead him with a stranger. *Seaman* v. *Wright*, 12 Abb. 304. See, also, *Metcalf* v. *Hervey*, 1 Ves. 249; *Cook* v. *Earl of Rosslyn*, 6 Jur. (N. S.) 267; *Crane* v. *Burntrager*, 1 Cart. (Ind.) 165. So, a bailee or agent cannot, at law, dispute the original title of the person from whom he received the property; and it is the general rule that a strict bill of interpleader cannot be maintained by a bailee or agent, to settle the conflicting claims of the bailor or principal, and a stranger who claims the property by a distinct and independent title. *Marvin* v. *Ellwood*, 11 Paige, 365; *Dixon* v. *Hamond*, 2 B. & Ald. 313; *First National Bank of Morristown* v. *Bininger*, 26 N. J. Eq. 345; *Nickolson* v. *Knowles*, 5 Madd. 47. And see *Hatfield* v. *Mc Whorter*, 40 Ga. 269; *Shaw* v. *Coster*, 8 Paige, 339. But see as qualifications of the general rule, *Crawford* v. *Fisher*, 1 Hare, 436, 440; *Wright* v. *Ward*, 4 Russ. 215, 220; *Gibson* v. *Goldthwaite*, 7 Ala. 282; *Reid* v. *Stearn*, 6 Jur. (N. S.) 267; *Badeau* v. *Tylee*, 1 Sandf. Ch. (N. Y.) 270.

§ 4. **Claims must be identical.** It is an inflexible rule that the thing to which the parties make adverse claims, whether it be a debt, a duty, or specific property, must be one and the same thing; or, in other words, the claims must be identical. When the subject in dispute has a bodily existence, no difficulty can arise on the ground of identity; but where it is a chose in action which has no bodily existence, it becomes necessary to determine what constitutes identity. Where the claims made by the defendants are of different amounts, they never can be identical; but where they are the same in amount, that circumstance goes far to determine their identity. The amount, however, may not of itself be sufficient, for the amount may be the

same and yet the debt may be different. The question, therefore, as to the identity of the debt is sometimes a difficult one and must, in each case, be determined by the original constitution and nature of the debt. *Glyn* v. *Duesbury*, 11 Sim. 148. And see *Sieveking* v. *Behrens*, 2 Myl. & Cr. 581; *School District* v. *Weston*, 31 Mich. 85. Thus, a vendee who is sued by his vendor for the price of goods purchased, and by a third party for the value of the goods in trover, cannot maintain an interpleader suit, since the claims made against him are not identical; the one seeking to have the benefit of a contract, the other claiming the value of a chattel, which is the subject-matter of it. *Slaney* v. *Sidney*, 14 M. & W. 800. But where a party has been assessed in two different counties for the same personal property, he may maintain an interpleader against two collectors seeking to collect the tax levied under such assessment, although the amounts in each case may be different, as the claims are for the same debt or duty. *Thomson* v. *Ebbets*, 1 Hopk. 272; *Dorn* v. *Fox*, 61 N. Y. (16 Sick.) 264. Where an auctioneer, by direction of the owner, sells the same property to two persons successively and receives a deposit from each, he cannot, on a claim made by the owner of the property for the amount of both deposits, and a counter-claim by each for the amount of his individual deposit, compel the owner and the purchasers to interplead. Although, as between the vendees there is one question in common, namely: who is the real purchaser of the estate, yet as against the auctioneer, their claims are for different things, namely: the individual deposit of each. But the auctioneer may compel the owner of the property and the first purchaser to interplead, or the owner and the second purchaser; as, between these parties. the claims are identical. *Hoggart* v. *Cutts*, 1 Cr. & Ph. 197.

Although the original debts may have been identical in amount, yet, where the plaintiff claims part payment as to one of the parties making a demand against him, an interpleader will not lie. *Diplock* v. *Hammond*, 27 Eng. Law & Eq. 202. And it is an undeviating rule that where the plaintiff raises any question as to the amount of the claim, which is the subject of litigation, this alone will be fatal to the right to the remedy. Id.

But the right to the remedy by interpleader is founded, not on the consideration that a man is subjected to double liability, but on the fact that he is threatened with double vexation in respect of one liability. *East & West India Dock Co.* v. *Littledale*, 7 Hare, 60; *Great Southern, etc., Railway Co.* v. *Corry*, 15 W. R. 651. The foregoing rules do not, therefore, require that the claims shall be identical in character, as that they shall be both legal, or both

equitable, in order to entitle the party against whom the claims are made to compel the claimants to interplead. If the claims are in fact identical it is a matter of no importance, so far as relates to the right to the remedy, that one is legal and the other equitable, or that they are both legal or both equitable. *Lowndes* v. *Cornford*, 18 Ves. 299; *Richards* v. *Salter*, 6 Johns. Ch. 445; *Hamilton* v. *Marks*, 19 Eng. Law & Eq. 321; S. C., 5 DeG. & S. 638; *Prudential Assurance Co.* v. *Thomas*, L. R., 3 Ch. App. 74; *Gibson* v. *Goldthwaite*, 7 Ala. 281; *Jones* v. *Farrell*, 1 DeG. & J. 212.

But the claims must not only relate to the same debt, duty, or thing, they must, moreover, be in reality conflicting claims. *Cochrane* v. *O'Brien*, 2 J. & L. 380; S. C., 8 Ir. Eq. 241; *Blair* v. *Porter*, 13 N. J. Eq. 267. A mere pretext of a conflicting claim, or the mere possibility that there may be two liabilities, is not sufficient to support a bill of interpleader. Id.; *Mohawk & Hudson R. R. Co.* v. *Clute*, 4 Paige, 384, 392.

§ 5. **Property or thing claimed must be definite.** To entitle a person to the remedy of interpleader it is essential that the property or thing claimed should be certain and definite in its character. *Lincoln* v. *Rutland, etc., R. R. Co.*, 24 Vt. 639. But the rule goes no further than this, and where the property in dispute is fixed and definite in its character, as shares in the capital stock of a bank, the precise value of the property is immaterial. *Cady* v. *Potter*, 55 Barb. 463.

§ 6. **Applicant for relief must be in possession.** It is likewise essential, in order to sustain a bill of interpleader, that the complainant should be in possession of the matter in dispute, and thus be able to obey any order of the court in relation to the disposition thereof. And it is not enough that similar property, or the same sum, may be in his possession, which he is willing to deposit or pay subject to the direction of the court, if the identical thing in controversy has been delivered to either of the claimants. *Burnett* v. *Anderson*, 1 Mer. 405; *Inland* v. *Bushell*, 5 Dowl. 147. See, also, *Tiernan* v. *Rescaniere*, 10 Gill & J. (Md.) 217; *Vosburgh* v. *Huntington*, 15 Abb. 254. The bill cannot be sustained by a person out of possession, even where it is filed by an administrator, to settle the rights of the distributees. *Martin* v. *Maberry*, 1 Dev. (N. C.) Eq. 169.

§ 7. **Diligence in applying for remedy.** A party seeking relief by interpleader must use due diligence in making the application. Otherwise, the remedy may be denied. *Brackenbury* v. *Laurie*, 3 Dowl. P. C. 180; *Larabrie* v. *Brown*, 1 De G. & J. 205. Thus, where the remedy is sought by a sheriff, as a protection against an action at law, for the seizure of goods which are not the property of the person

against whom the execution was issued, he must use due diligence, as a very slight delay will defeat his title. *Tufton* v. *Harding*, 29 L. J. Ch. 225.

Delay is not, however, material, so long as the course of proceedings taken by the different claimants is such as, if persevered in, will determine their respective rights as between themselves without the intervention of a court of equity. *Sieveking* v. *Behrens*, 2 Myl. & Cr. 581.

§ 8. **Statutory provisions.** By the English Statute of 23 and 24 Vict., ch. 126, § 12, authority is given to courts of law to direct an interpleader for settling the rights of conflicting claims to the same property, in such cases as courts of equity allow an interpleader bill. See *Tanner* v. *European Bank*, L. R., 1 Exch. 261; *Rusden* v. *Pope*, 3 id. 269; *Hurst* v. *Sheldon*, 13 C. B. (N. S.) 750. So, similar authority has been conferred upon courts of law by the codes of practice adopted in many of the States. See *Bates* v. *Lilly*, 65 N. C. 232; *McKay* v. *Draper*, 27 N. Y. (1 Smith) 256; *Nelson* v. *Goree*, 34 Ala. 565; *Rohrer* v. *Turrill*, 4 Minn. 407; *Board of Education* v. *Scoville*, 13 Kan. 17.

ARTICLE III.

INSTANCES.

Section 1. When allowed. Upon the general principles of equity jurisprudence, a bank may be entitled to relief by a bill of interpleader against separate and adversary parties who claim title to moneys therein deposited. *City Bank of New York* v. *Skelton*, 2 Blatchf. (C. C.) 14. And the United States may have the remedy for the adjudication of the rights of hostile claimants to a fund in its hands. *Tiernan* v. *Rescaniere*, 10 Gill & J. (Md.) 217.

Where the money due on a negotiable promissory note is claimed on the one hand by a creditor of the payee, who has attached the money in the hands of the maker of the note before its maturity, and on the other hand by an indorsee of the note, who took it subsequently to the attachment, but before its maturity, and who claims to be a *bona fide* holder for a valuable consideration, without notice of the attachment, this state of facts is held to present a proper case for a bill of interpleader. *Briant* v. *Reed*, 1 McCart. (N. J.) 271.

It is held that a bill of interpleader will lie, by a tenant, where, upon the death of the lessor, conflicting claims for the rent are made by a devisee and the heirs of the lessor. *Badeau* v. *Tylee*, 1 Sandf. Ch.

270. So, where two parties claiming adversely an estate under the limitations of a settlement which contained a power of leasing, brought actions against a tenant for rent, reserved by a lease made under the power — it was held that the case was a proper one for an interpleader. *Birmingham* v. *Tuite*, 7 Ir. Eq. 221.

The case where a reward has been publicly offered to any one who will furnish evidence to secure the conviction of an offender, and several persons claim to have furnished the evidence and to be entitled to the sum offered, is held to be peculiarly proper for an interpleader. *Fargo* v. *Arthur*, 43 How. (N. Y.) 193. So, where goods had been placed in the charge of common carriers for transportation, and immediately afterward two different parties, with distinct and separate interests, presented themselves as claimants for the goods, one of whom brought an action against the carriers for the recovery of the goods, and the other threatened an action — this was held to be a proper case for an interpleader. *Schuyler* v. *Hargous*, 28 id. 245; S. C., 3 Robt. 673.

It is no objection to a bill of interpleader, that another bill in chancery is pending in which the defendant is complainant; especially where there is more than one such suit in equity pending, besides several at law, and such suit is one of the very grievances complained of, and where neither of the pending suits could determine the question of the rights of all the parties, or as to the whole fund. *School District* v. *Weston*, 31 Mich. 86.

§ 2. **When denied.** A bill of interpleader cannot be sustained where the plaintiff is obliged to state that, as to some of the defendants, he is a wrong-doer. *United States* v. *Victor*, 16 Abb. (N. Y.) 153; *Tyus* v. *Rust*, 37 Ga. 574; *Mt. Holly, etc., Turnpike Co.* v. *Ferree*, 17 N. J. Eq. 117; *Quinn* v. *Green*, 1 Ired. (N. C.) Eq. 229. Thus, if a sheriff has an execution in favor of one person, and levies it upon property claimed by another, he cannot require these persons to interplead, because if the claim of the person against whom there is no execution be just, the sheriff is a wrong-doer as to him. Id.; *Slingsby* v. *Boulton*, 1 Ves. & B. 334; *Shaw* v. *Coster*, 8 Paige, 339; *Dewey* v. *White*, 65 No. Car. 225. See *Storrs* v. *Payne*, 4 Hen. & M. (Va.) 506. But in *Child* v. *Mann*, L. R., 3 Eq. 806, the sheriff was allowed to file a bill of interpleader against the execution creditor and the assignee in bankruptcy of the execution creditor. So, the sheriff has a remedy by an application to the summary jurisdiction of the court, in obedience to whose injunction he has suspended proceedings under an injunction, for protection and instructions. *Ex parte Sheriff of Middlesex*, 12 id. 207; *Barker* v. *Parker*, 42 N. H. 78.

A debtor who has been served with a notice that an attachment has been granted against the property of the creditor has no standing in court to interplead his creditor and the plaintiffs in the attachment. *United States, etc., Co.* v. *Wiley*, 41 Barb. 477.

Nor is a bailee entitled to call upon a party to interplead as to the property on the ground that as to such party he is a stakeholder or trustee, when, at the time of the bailment, the party was unknown and had no connection with the transaction. *First National Bank* v. *Bininger*, 26 N. J. Eq. 345. And see *Lund* v. *Seamen's Bank*, 37 Barb. 129.

In Massachusetts the remedy at law of a person upon whom a tax is illegally assessed by a town or city is plain, *adequate*, complete and exhaustive, in the event of the tax being collected. *Clouston* v. *Shearer*, 99 Mass. 209; *Norton* v. *City of Boston*, 119 id. 194. A trustee under a will cannot, therefore, maintain a bill in equity against two towns to determine in which he is liable to be taxed. *Macy* v. *Inhabitants of Nantucket*, 121 id. 351. See, also, *Greene* v. *Mumford*, 5 R. I. 472. But it is held in New York that where an occupied farm lying partly in each of two adjoining towns is assessed and taxed in both towns, and warrants for the collection of the taxes are placed in the hands of the respective town collectors, an action in the nature of a bill of interpleader may be maintained by the owner and occupant against the two collectors for the purpose of determining in which town his farm is properly taxed. *Dorn* v. *Fox*, 61 N. Y. (16 Sick.) 264.

An administrator cannot maintain a bill of interpleader against those claiming the benefit of an order of distribution. *Freeland* v. *Wilson*, 18 Mo. 380.

CHAPTER LXXXV.

JOINT-STOCK COMPANIES.

TITLE I.

GENERAL RULES AND PRINCIPLES.

ARTICLE I.

NATURE, RIGHTS AND LIABILITIES.

Section 1. Definition and nature. A joint-stock company has been defined as an association in which the capital is thrown into one mass and employed for the general benefit, each member participating in the gain according to the proportion of stock or capital which belongs to him. Wordsw. Joint-Stock Comp. 1.

Unincorporated joint-stock companies are usually regarded as mere partnerships, differing from common partnerships only in the larger number of persons constituting the company. See *Robbins* v. *Butler*, 24 Ill. 397; *Bullard* v. *Kinney*, 10 Cal. 60; *Coal Co.* v. *Fry*, 4 Phil. (Penn.) 129; *Greenwood's Case*, 23 Eng. Law & Eq. 422; *Lafond* v. *Deems*, 52 How. (N. Y.) 41. It has, however, been said that such companies are not pure partnerships, for their members are recognized as an aggregate body; nor are they pure corporations, for their members are more or less liable to contribute to the debts of the collective whole. They are rather associations of persons intermediate between corporations known to the common law, and ordinary partnerships; and partaking of the nature of both. Lindley on Part. 6. And see *Oliver* v. *Liverpool, etc., Ins. Co.*, 100 Mass 531, 539. Such, at least, would seem to be the character of joint-stock companies in England, where they are regulated by statute. But, generally speaking, companies or societies which are not expressly sanctioned by the legislature, pursuant to some special or general law, are nothing more than ordinary partnerships, and the rules of law respecting them are the same. *Wells* v. *Gates*, 18 Barb. 557; *Butterfield* v. *Beardsley*, 28 Mich. 412; *Moore* v. *Brink*, 4 Hun (N. Y.), 402.

§ 2. **How organized.** In England, owing to the difficulty and expense attending incorporation, joint-stock companies are very common, and there are numerous acts of parliament which relate especially to them, and which, in the formation of them, require certain formalities to be observed. But in this country, where the same necessity for such companies does not seem to exist, because of the facility of incorporation, the law makes no distinction in respect to the manner in which they may be created, between them and private or ordinary copartnerships. See *Wells* v. *Gates*, 18 Barb. 557; *Cox* v. *Bodfish*, 35 Me. 302; *Babb* v. *Reed*, 5 Rawle (Penn.), 151. They have a common name, which is usually descriptive of their business, like that of a corporation, and they have their officers, their by-laws, and rules of proceeding, by which they regulate the election of officers, the transaction of business, the transfer of shares, and the like. Pars. on Part. 542. But it is only necessary that a person should subscribe the articles of association to entitle him to the rights, or make him subject to the liabilities of a member. *Dennis* v. *Kennedy*, 19 Barb. 517. And see *Walburn* v. *Ingilby*, 1 Myl. & K. 61.

§ 3. **Membership.** The object of an unincorporated joint-stock company, or of a voluntary unincorporated association, usually is, the prosecution of some important undertaking, for which the capital and exertions of a few individuals would be inadequate, and it may therefore consist of an indefinite, or of a very large number, of joint undertakers. But as the privileges of membership in such an association are not conferred by the sovereign power, but are merely created by the organization itself, courts of law cannot compel the admission of an applicant for membership, nor interfere to restore a member who has been deprived for non-compliance with the conditions on which membership is made to depend. *White* v. *Brownell*, 4 Abb. (N. S.) 162; S. C., 2 Daly, 329; affirming S. C., 3 Abb. (N. S.) 318; *Ollery* v. *Brown*, 51 How. 92. But see *Leech* v. *Harris*, 2 Brewst. (Penn.) 571. The courts will not interfere, unless a clear case of injustice is shown. *Burton* v. *St. George's Society*, 28 Mich. 261.

§ 4. **Individual liabilities.** The members of an unincorporated association, organized for carrying on a business without being incorporated, are liable, in general, as partners, to third parties, to the full extent of the indebtedness of the association. *Pipe* v. *Bateman*, 1 Iowa, 369; *Keasley* v. *Codd*, 2 Car. & P. 408; *Tappan* v. *Bailey*, 4 Metc. (Mass.) 535; *Moore* v. *Brink*, 4 Hun (N. Y.), 402; 6 N. Y. Sup. (T. & C.) 22. Thus, a number of persons signed a writing, commencing, "We, the subscribers, hereby form an association or company, for the purpose of establishing a scientific journal or paper." By

this writing, three managers were appointed, who were authorized to establish and conduct the paper, when sufficient capital was subscribed, paid in, or secured. Materials necessary to establish the paper were purchased by an agent appointed by two of the managers; and it was held, 1. That the subscribers to the writing were liable, for the debt incurred, as partners. 2. That the acts of the two managers bound the subscribers; and that the concurrence of the third, if it were necessary, where the contrary did not appear, would be presumed. *Wells* v. *Gates*, 18 Barb. 554. So, the members of an association are liable for goods furnished on the order of an agent of the association, if furnished with their concurrence and approbation. *Ridgely* v. *Dobson*, 3 Watts & Serg. 118; *Robinson* v. *Robinson*, 10 Me. 240. See *Fredendall* v. *Taylor*, 23 Wis. 538. And where an association, formed for any purpose, afterward becomes incorporated, and the corporation then accepts an assignment of all the property of such association, for the purpose of carrying out their objects, they are primarily and jointly and severally liable for all the debts incurred before the act of incorporation. *Haslett* v. *Wotherspoon*, 1 Strobh. (S. C.) Eq. 209. See, also, *Goddard* v. *Pratt*, 16 Pick. 412; *Witmer* v. *Schlatter*, 2 Rawle, 359.

But where A rented a room to an association of individuals, at a monthly rent, and after the contract, B became a member of the association, and, as such, used and occupied the room, it was held, that B was not liable for the rent before or after he became a member. *Barry* v. *Nuckolls*, 2 Humph. (Tenn.) 324. And persons admitted to be members, under articles of association of an unincorporated banking company, formed for the circulation of "change tickets," are not liable for tickets issued before they became members. *Lake* v. *Munford*, 12 Miss. 312. So, an association which assesses a member, individually, before its incorporation, which incorporation is procured without the concurrence of the member, cannot enforce the assessment against him. *Richmond, etc., Association* v. *Clarke*, 61 Me. 351.

Where several persons are engaged in a joint enterprise for their mutual benefit, each has a right to demand and expect from his associates good faith in all that relates to their common interests, and no one of them will be permitted to take to himself a secret and separate advantage to the prejudice of the others. And where one, unknown to his associates, causes to be transferred to the association, property previously purchased by himself, at a price exceeding that paid by him therefor, he is accountable to his associates for the profits thus made. *Getty* v. *Devlin*, 54 N. Y. (9 Sick.) 403. And see *Secor* v. *Lord*, 3 Keyes (N. Y.), 525; S. C., 4 Abb. Ct. App. 188. But persons who are the owners of property, real or personal, may form a partnership or as-

sociation with others, and sell that property to the association, at any price; provided, no fraudulent representations are made by the vendors. *Densmore Oil Co.* v. *Densmore*, 64 Penn. St. 43.

It is the general rule that the liability of individual members of an unincorporated joint-stock company, growing out of the association, must be determined by the law of the place where the association was formed, and where it had its place of business. But a bill of exchange drawn by the association may be governed by the laws of the place where it is made payable. *Cutler* v. *Thomas*, 25 Vt. 73.

§ 5. **Officers, their rights and powers.** A voluntary association, such, for instance, as the order of Odd Fellows, cannot confer judicial powers on its officers or committees. The creation of judicial tribunals is one of the functions of the sovereign power, and an adjudication of such officers, as such, on rights of property, is not good as a judgment, nor, it seems, as an award. *Austin* v. *Searing*, 16 N. Y. (2 Smith) 112. See, also, *Savannah Cotton Exchange* v. *State*, 54 Ga. 668.

Where, by the articles of an unincorporated joint-stock association, it was agreed that all the property of the company should be vested in trustees thereafter to be elected, and that the subscribers would pay to such trustees the amount of their respective subscriptions, it was held that an action to recover the amount subscribed by a member might be brought and maintained in the names of the trustees so elected. *Cross* v. *Jackson*, 5 Hill (N. Y.), 478. It would, however, have been otherwise, had the articles contained no express promise to pay the trustees. Id. And see *post*, 167, § 12. And it has been held that an action cannot be maintained by the treasurer of an unincorporated association, against one, upon his promise in writing, to pay money as a subscription, the same being payable to the "treasurer" of such association, alone. *Ewing* v. *Medlock*, 5 Port. (Ala.) 82.

Expenses incurred by the trustees of an unincorporated land company, though made in good faith, and although they tended greatly to enhance the value of the land, cannot be allowed as a credit to the trustees in their account, unless such expenditures were authorized by the company. *McKinley* v. *Irvine*, 13 Ala. 681. See, also, *Crum's Appeal*, 66 Penn. St. 474.

§ 6. **Officers, their duties and liabilities.** The directors of an unincorporated company stand in the relation of trustees to the stockholders; and any gain which may accrue to them in the discharge of their official duties must inure to the benefit of their *cestuis que trust.* *Coal Company* v. *Fry*, 5 Phil. (Penn.) 129. But the trustees of an association are not individually liable for its debts unless they have in some way specially rendered themselves liable. *Wolf* v. *Schlieffer*, 2

Brewst. (Penn.) 563. The treasurer of a voluntary association for charitable purposes will be required to account for the money in his hands, and to pay it over to those entitled to receive it according to the interests of the association. *Penfield* v. *Skinner*, 11 Vt. 296. See, also, *Bennett* v. *Wheeler*, 12 La. Ann. 763; *Koehler* v. *Brown*, 2 Daly (N. Y.), 78; S. C., 31 How. 235. And it is held that a committee appointed by an unincorporated association to make arrangements for a public exhibition are individually liable for work necessary for the occasion, which a sub-committee of their number procure to be done, although in making the contract the sub-committee assumed to act as officers of the association. *Fredendall* v. *Taylor*, 23 Wis. 538. And see *McCartee* v. *Chambers*, 6 Wend. 649; *Sizer* v. *Daniels*, 66 Barb. 426.

When a joint-stock operation has been adjusted by the distribution of stock *pro rata*, according to the interest paid for by the parties, such adjustment cannot be disturbed at the instance of one of the stockholders. Managers appointed in pursuance of a joinder of interests, to conduct the affairs of the parties joined, are liable for neglect or fraud; but the stockholders stand to each other in the relation of co-owners of the property managed, and cannot be made liable for the acts of their managers. *Boody* v. *Drew*, 46 How. (N. Y.) 459; S. C., 2 N. Y. Sup. (T. & C.) 69.

§ 7. **Of the property of the company.** There are said to be four elements of property in all joint-stock companies: *First*, the capital stock; *second*, the corporate property; *third*, the franchise; and *fourth*, the individual stock of the stockholders. *Louisville, etc., R. R. Co.* v. *State*, 8 Heisk. (Tenn.) 663, 795. It has frequently been held that a voluntary, unincorporated association has not legal capacity to receive a donation, even for a purpose denominated "charitable." See *Green* v. *Allen*, 5 Humph. (Tenn.) 170; *Goesele* v. *Bimeler*, 5 McLean, 223; *Baptist Association* v. *Hart*, 4 Wheat. (U. S.) 1; *Sherwood* v. *American Bible Society*, 1 Keyes (N. Y.), 561; S. C., 4 Abb. Ct. App. 227; *White* v. *Howard*, 46 N. Y. (1 Sick.) 144; *ante*, Vol. 2, 148, 149. But that a bequest to such an association may be valid or be made to take effect indirectly. See *Preachers' Aid Society* v. *Rich*, 45 Me. 552; *Cahill* v. *Bigger*, 8 B. Monr. (Ky.) 211; *Smith* v. *Nelson*, 18 Vt. 511, 546; *Peabody* v. *Eastern Methodist Society*, 5 Allen, 540; *Gibson* v. *McCall*, 1 Rich. (S. C.) 174.

The funds of an association which are placed under the control of its managers for the purposes for which they have been raised, may be appropriated to any purpose within the scope of the general object, by a majority of the members present at a regularly convened meeting of

such association. But they can only be thus applied to further the general purpose for which they were contributed. Thus, money contributed to free a district from a draft of soldiers cannot, by a vote of a mere majority of the persons contributing it, be devoted to establish a city dispensary. *Abels* v. *McKean*, 18 N. J. Eq. 462. So, the profits of a fair are required to be applied to the purposes for which the fair was held; and self-constituted trustees have no right to divert the fund from those purposes. *Morton* v. *Smith*, 5 Bush (Ky.), 467.

There is no legal impediment to the vesting of the title to property in a company or association before they become incorporated, and no formal transfer of the joint property is necessary upon the formation of the corporation, provided it is acquired for the purpose of forming a corporation, and the members of the association agree that it shall belong to the corporation when formed. *American Silk Works* v. *Salomon*, 6 N. Y. Sup. (T. & C.) 352; S. C., 4 Hun, 135. Thus, corporations may acquire title to money paid upon subscriptions to capital stock before the corporation has a legal existence, and it has been held that they may be formed by means of contributions of property other than money. *Boynton* v. *Hatch*, 47 N. Y. (2 Sick.) 225.

§ 8. **Of the stock generally.** As it respects the stock of an unincorporated joint-stock company, it may be regarded as settled:

First, that any stockholder may transfer his interest in any way which would operate a transfer at common law, regardless of the rules of the company, and yet the transfer will be valid. See *Alvord* v. *Smith*, 5 Pick. 232; *Fox* v. *Clifton*, 6 Bing. 776; S. C., 9 id. 115.

Second, that the transferee in such case will neither be a partner by such irregular transfer, nor have any claim against the company to be a partner. *Harper* v. *Raymond*, 3 Bosw. (N. Y.) 29; S. C., 7 Abb. 142; *Marquand* v. *New York Manuf. Co.*, 17 Johns. 525, 535; *Bray* v. *Fromont*, 6 Madd. 5; *Moddewell* v. *Keever*, 8 Watts & Serg. 63; *Kingman* v. *Spurr*, 7 Pick. 235. See *Smith* v. *Virgin*, 33 Me. 148.

Third, that this transferee might require an account and settlement, so far as to ascertain his rights and the value of his share, but would have no right to any particular thing in specie, nor to a division of the effects. See *Putnam* v. *Wise*, 1 Hill (N. Y.), 234; *Kingman* v. *Spurr*, 7 Pick. 235; *Burnes* v. *Pennell*, 2 H. L. Cas. 497.

Fourth, that if a stockholder transfer his share agreeably to all the rules of the company, the latter may, nevertheless, with or without reason, refuse to accept the transferee as a partner, and withhold his certificate. Pars. on Part. 546, 547. And see *Nicoll* v. *Mumford*, 4 Johns. Ch. 522; *Tatam* v. *Williams*, 3 Hare, 347.

Where an unincorporated joint-stock association is formed, and the members of it, by the articles of association, promise to pay the amount of stock by them severally subscribed, in calls to be made by trustees named in the articles, an action at law lies to enforce such promise, notwithstanding that both the plaintiffs and the defendants are members of the association, and consequently copartners. *Townsend* v. *Goewey*, 19 Wend. 424. See *Crater* v. *Bininger*, 45 N. Y. (6 Hand) 545.

Where the trustees of the stockholders in a private association suffered shares in the stock to be transferred to a *bona fide* purchaser without notice, by a person not having authority to make the transfer, it was held that the loss, in a contest between such purchaser and the stockholders, ought to fall on the latter. *Cohen* v. *Gwynn*, 4 Md. Ch. 357.

§ 9. **Contracts, rights and liabilities under.** By the articles of association of an incorporated company it was provided that the agents and trustees should have no authority to bind it by contract, unless containing a restriction that payment should be made solely out of the joint property of the association. The president, however, made an oral contract with the plaintiff for work to be done by him without any such restriction; and it was held that the contract was void, but that the company having had the benefit of the work, its members were liable to the plaintiff for it on a *quantum meruit*. *Sullivan* v. *Campbell*, 2 Hall (N. Y.), 271.

A part of the members of a voluntary association cannot bind the others without their consent before the act which it is claimed binds them is done, or they, with full knowledge of the facts, ratify and adopt it. There are cases in which the act done is so clearly in furtherance of the object for which the association was organized, that all will be presumptively bound by it; but when such is not the case, consent or ratification must be proved. *Sizer* v. *Daniels*, 66 Barb. 426.

Where the president and other members of an incorporated company purchased and paid for property for the company, without authority, a ratification by managers of the company, who had no authority to borrow money or increase the capital, was held to be insufficient to bind the members. *Crum's Appeal*, 66 Penn. St. 474.

But evidence of the custom of an unincorporated union store association, of its established and uniform mode of doing business, is held to be admissible to show acquiescence in, or consent to, a departure from its by-laws. And the directors of such an association will not be held liable for its losses because they neglected to perform some of the duties imposed by the by-laws, when such duties were principally transferred by the association to an agent, and the members knew of and acquiesced

in the disregard of the by-laws, and when such losses cannot be directly traced to the negligence of the directors. *Henry* v. *Jackson*, 37 Vt. 431. See *Dow* v. *Moore*, 47 N. H. 419.

§ 10. **Dissolution of company.** See *ante*, 164, § 8. When a joint-stock company or association can no longer be carried on, with reference to the objects originally contemplated, or on account of a failure in procuring the requisite amount of capital, or in consequence of disputes between the shareholders, it becomes expedient to dissolve the concern. And in order to effect this, application must be made to a court of equity, unless by the provisions of any particular charter or statute, incorporating or regulating a company, a precise time has been fixed during which the partnership shall last, or it has been stipulated that a dissolution shall take place in the event of certain circumstances arising as therein specified. In the former case the partnership is *ipso facto* dissolved at the expiration of the term. In the latter, the dissolution takes place on the happening of the given or stipulated event. See Wordsw. Joint-Stock Comp. 392. And where a sale and distribution of the property in a certain period is positively provided for by private articles of association, any of the shareholders have a right to insist upon a sale and distribution according to the articles, although it may not be for the interest of the concern. *Mann* v. *Butler*, 2 Barb. Ch. 362.

It has been held that the exclusion of a member from the privilege of membership in a voluntary association, or the exclusion of one elected a trustee from the exercise of his office, may be sufficient ground for decreeing a dissolution. *Berry* v. *Cross*, 3 Sandf. Ch. 1; *Gorman* v. *Russell*, 14 Cal. 532; S. C. affirmed, 18 id. 688. Thus, if a voluntary association for mutual relief in sickness or distress exclude a member from its meetings, because he refuses to take an oath administered by the president, which oath was not required by the constitution or the by-laws, and is foreign to the objects of the association, this is held to be ground for a dissolution. Id. And see *Buckley* v. *Cater*, 17 Ves. 19, note; *Beaumont* v. *Meredith*, 3 Ves. & B. 180; *Ellison* v. *Bignold*, 2 Jac. & W. 511; *ante*, 160, § 3.

Where the articles of a voluntary association provided that upon a sale by any member of the property in reference to which he had become a member of the association, and notice thereof to the secretary, such member should be discharged from further liability, and that his successor in the ownership could be substituted in his place as a member upon signing the articles — it was held that neither the sale by a member of his property, nor the withdrawal from the association of any owner, operated as a dissolution of the association so as to exonerate

those who continued members from assessments laid by the association. *Troy Iron, etc., Factory* v. *Winslow*, 45 Barb. 231. Under such articles the obligation would rest upon those who remained, after any withdrawal and any neglect of the successor to become a member, to contribute their due proportion as previously agreed upon, to sustain the expenses of the association. Id.

Upon the dissolution of a joint-stock company, it is the duty of the trustees to convert the assets into money, and distribute the proceeds among the stockholders. They have no right to exchange the assets, or any portion thereof, of the old association, for the corporate stock of any association, without the consent of all the stockholders. *Mann* v. *Butler*, 2 Barb. Ch. 362. And see *Penfield* v. *Skinner*, 11 Vt. 296; *Lake* v. *Mumford*, 12 Miss. 312. And a stockholder not consenting to such exchange may recover the amount of his stock so wrongfully disposed of. *Frothingham* v. *Barney*, 6 Hun (N. Y.), 366.

§ 11. **Action by the company.** Unincorporated voluntary associations, except for charitable purposes, whatever may be the number of their members, and of whatever nature or extent the object undertaken, are nothing more than partnerships. And when suit is brought in their behalf, it must be brought in the name of the partners, or in the name of one or more for the use of all. *Pipe* v. *Bateman*, 1 Iowa, 369; *Birmingham* v. *Gallagher*, 112 Mass. 190; *Cockburn* v. *Thompson*, 16 Ves. 321; *Gorman* v. *Russell*, 14 Cal. 531.

It is not illegal for workmen to form and act as an association for the purpose of protecting themselves against the "encroachments" of their employers, and to agree in furtherance of such object not to teach others their trade unless by consent of the society. And such an association of workmen can maintain an action for the recovery of money belonging to them, although in attempting to carry out such purpose they have been guilty of illegal acts. *Snow* v. *Wheeler*, 113 Mass. 179.

§ 12. **Actions against the company.** When the articles of association do not regulate the remedies of members as between themselves, the general law of partnership applies, and an associate cannot maintain assumpsit, for goods sold and delivered, against the association; neither can his assignee. *Bullard* v. *Kinney*, 10 Cal. 60. Nor is a member entitled to compensation for conducting the business of the company. *Coal Company* v. *Fry*, 4 Phil. (Penn.) 129. And, in general, an action cannot be maintained by a member against the company or by the company against a member, on a contract between him and the company. *Wilson* v. *Curzon*, 15 Mees. & W. 532; *Perring* v. *Hone*, 4 Bing. 28; *Holmes* v. *Higgins*, 1 B. & C. 74. A member of a joint-stock company may, however, like a member of an ordinary partnership, recover

compensation for services rendered to the company previous to his having become a member of it. *Lucas* v. *Beach*, 1 Man. & G. 417. But where an action was brought against a railroad company to recover the value of services performed before the incorporation, in procuring the charter, making surveys, etc., it was held that the plaintiffs could not recover in the absence of proof that a majority of the corporators or promoters of the corporation authorized the service. *Bell's Gap R. R. Co.* v. *Christy*, 79 Penn. St. 54; S. C., 21 Am. Rep. 39.

One of several associates having employed the plaintiffs to do work for the benefit of the association, and having accounted with his associates on the basis of assuming and being credited with payment of what is due to the plaintiffs, is held liable to the plaintiffs therefor, without his associates being joined in the action. *Secor* v. *Lord*, 3 Keyes (N. Y.), 525; S. C., 4 Abb. Ct. App. 188.

Under the statute of New York, allowing an action against an unincorporated association, composed of not less than seven persons, to be brought against the president or treasurer, it is not necessary that the individuals comprising the membership should be made parties. The action is well brought against the president or treasurer of the association named as defendant. *Olery* v. *Brown*, 51 How. (N. Y.) 92. But an action against the president, secretary and treasurer is improperly brought. *Schmidt* v. *Gunther*, 5 Daly (N. Y.), 452.

The fact that when articles purchased for the use of an association were first ordered, the credit was given not to the association, but to an individual, will not prevent the association from being held liable if the articles are received and used by its agents in its works and business. But as such liability arises out of the fact that the association was the real party for whom the goods were furnished, it continues only so long as the association continues to sustain that relation to the business in which the debt was contracted. When the association ceases to be interested in the works by a transfer of its interest therein to a new company, it is not liable for goods afterward furnished. An agent's authority to bind the association, by accepting goods, ends when it parts with its interest. *Allen* v. *Clark*, 65 Barb. 563. And see *Heath* v. *Sansom*, 4 Barn. & Ad. 175; *Grosvenor* v. *Lloyd*, 1 Metc. (Mass.) 19.

If one of the members of a joint-stock company or association dies, a creditor of the association must proceed and exhaust his remedy against the surviving members before he can maintain an action against the personal representatives of the deceased. *Moore* v. *Brink*, 4 Hun (N. Y.), 402; S. C., 6 N. Y. Sup. (T. & C.) 22.

CHAPTER LXXXVI.

JOINT TENANTS AND TENANTS IN COMMON.

TITLE I.

OF THE TENANCY IN GENERAL.

ARTICLE I.

OF THE NATURE OF THE ESTATE.

Section 1. Definition and nature. As to joint tenancy, and tenancy in common, in chattels, see *ante*, Vol. 2, pp. 246 to 248.

At common law, an estate in joint tenancy is where lands or tenements are granted to two or more persons to hold in fee simple, fee tail, for life, for years, or at will. 1 Broom & Had. Com. (Wait's ed.) 640. In consequence of such grants an estate is called an estate in joint tenancy, which signifies a union or conjunction of interest. Each joint tenant has the entire possession of every parcel and of the whole; and this unity and entirety of interest and possession has given rise to the principal incident to the estate, which is the right of *survivorship*. The interest being not only equal or similar, but also one and the same, on the death of his companion, the sole interest in the whole remains to the survivor. See id.; Co. Litt. 180 *b;* Wms. Real Prop. 112; *Coster* v. *Lorillard*, 14 Wend. 265, 336.

A tenancy in common is where two or more hold possession of lands or tenements at the same time by several and distinct titles. Washb. Real Prop. 415. And the essential difference between joint tenants and tenants in common is, that joint tenants have the land by one joint title and in one right; and tenants in common by several titles, or by one title and several rights — which is the reason that joint tenants have one joint freehold, and tenants in common have several freeholds. Co. Litt. 189, l. Or, as more briefly expressed — joint tenants have one estate in the whole and no estate in any particular part. Tenants in common have several and distinct estates in their respective parts. 1

Prest. Est. 137. Unity of right of possession merely, is all that is required to constitute a tenancy in common. *Putnam* v. *Ritchie*, 6 Paige, 390.

§ 2. **Who are joint tenants, or tenants in common.** The distinguishing characteristics of a joint tenancy is the right of survivorship. Two corporations, therefore, cannot hold land as joint tenants; for being each perpetual, there can be no survivorship between them. *De Witt* v. *San Francisco*, 2 Cal. 289. Nor can a corporation hold lands as joint tenant with a natural person, since there is no reciprocity of survivorship between them. Id.; Ang. and Ames on Corp., § 185. But corporations may hold as tenants in common, either with natural persons (id.; *Telfair* v. *Howe*, 3 Rich. [S. C.] Eq. 235); or with themselves. *De Witt* v. *San Francisco*, 2 Cal. 289. See *New York, etc., Canal Co.* v. *Fulton Bank*, 7 Wend. 412. And all natural persons may, of course, be joint tenants with each other.

But the common law clearly recognizes the distinction between the estates of joint tenants, and that of husband and wife upon a conveyance to them In the case of joint tenants in fee simple, each would have a right, without the consent of the other, to dispose of an undivided moiety of the inheritance. But in the case of a conveyance of land in fee simple to a man and his wife, they take not by moieties, but by entireties; and while the husband may do what he pleases with the rents and profits during coverture, he cannot dispose of any part of the inheritance without his wife's concurrence. *Hemingway* v. *Scales*, 42 Miss. 1; S. C., 2 Am. Rep. 586; *Beach* v. *Hollister*, 5 N. Y. Sup. (T. & C.) 568; S. C., 3 Hun, 519; *Bates* v. *Seely*, 46 Penn. St. 248; *Thomas* v. *Debaum*, 1 McCart. (N. J.) 37; *Wales* v. *Coffin*, 13 Allen, 213; *Stuckey* v. *Keefe's Ex'rs*, 26 Penn. St. 397. On the death of either, the whole estate goes to the survivor. Id. But it has been held as the law in Connecticut, that where land is given to husband and wife they take as joint tenants, and consequently, that a conveyance by the husband alone of his interest is valid and effectual. *Benedict* v. *Gaylord*, 11 Conn. 337. And in Ohio, where no joint tenancy exists, and the doctrine of survivorship is unknown, even as to a devise to husband and wife, they take as tenants in common, and not as tenants of the entirety. *Wilson* v. *Fleming*, 13 Ohio, 68.

If an estate be made to husband and wife, and a third person, and their heirs, the husband and wife take but one moiety, and the third person takes the other. *Back* v. *Andrew*, 2 Vern. 120. And see *Att.-Gen.* v. *Bacchus*, 9 Price, 30; *Doe* v. *Wilson*, 4 Barn. & Ald. 303.

Infants may be joint tenants. Bac. Abr., Joint Tenants, B. And a child becomes, at its birth, joint tenant with the mother, of lands which

the latter holds in special tail. *Powell* v. *Powell*, 5 Bush (Ky.), 619. Under a devise of an estate "to my three daughters, Margaret, Elizabeth, and Mary" (Mary's children to take their mother's share), — there was held to be a tenancy in common between the two daughters and the children of the third, and not a joint tenancy. *Martin* v. *Smith*, 5 Binn. (Penn.) 16.

As a general rule, co-trustees are joint tenants. *Webster* v. *Vandeventer*, 6 Gray, 428; *Parsons* v. *Boyd*, 20 Ala. 112. And a conveyance to a trustee for the use and benefit of two or more persons vests the equitable estate in the *cestuis que trust* as joint tenants. *Greer* v. *Blanchar*, 40 Cal. 194.

In cases of contracts between the owner and the cultivator of the land for a division of the crops, they are tenants in common therein until the crops are separated and severed. And either party may sell or mortgage his portion of the crops. *Hurd* v. *Darling*, 14 Vt. 214; *Knox* v. *Marshall*, 19 Cal. 617; *Carr* v. *Dodge*, 40 N. H. 403; *Walker* v. *Fitts*, 24 Pick. 191; *Williams* v. *Nolen*, 34 Ala. 167; *Gafford* v. *Stearns*, 51 id. 434; *Jones* v. *Chamberlin*, 5 Heisk. (Tenn.) 210; *Mann* v. *Taylor*, id. 267. And see *ante*, Vol. 2, p. 248. But see *Tanner* v. *Hills*, 48 N. Y. (3 Sick.) 662. So, two or more persons, hiring land by an instrument under seal, and agreeing to pay rent in a certain proportion of the crop, are held to be tenants in common, not partners of the crop, until a division is made. *Putnam* v. *Wise*, 1 Hill (N. Y.), 234. And where one was tenant for years of a spring, under a lease not recorded, and another purchased one-half of the land in which the spring was, without notice of the incumbrance, and subsequently purchased the other half, with notice, they were held to be tenants in common of the spring while the term continued. *Herbert* v. *Odlin*, 40 N. H. 267. So, the lease of a pew in perpetuity makes the lessees tenants in common of realty. *St. Paul's Church* v. *Ford*, 34 Barb. 16. So, where there are two several grants of the same land, bearing the same date, upon surveys recorded and certified the same day, and purporting to have been made upon warrants issued the same day, the grantees take as tenants in common. *Young* v. *DeBruhl*, 11 Rich. (S. C.) L. 638. And see *Seckel* v. *Engle*, 2 Rawle (Penn.), 68; *Welch* v. *Sackett*, 12 Wis. 243.

But a tenant in dower, not having her dower interest in the land assigned to her, is not a tenant in common with the children of the deceased owner of the land. *Grossman* v. *Lauber*, 29 Ind. 618; *Jackson* v. *O'Donaghy*, 7 Johns. 247; *Ex parte Burgess*, 1 Del. Ch. 233. And a privilege reserved to a person in a dwelling-house for a particular purpose, and for a limited time, does not constitute him a tenant in com-

mon of the estate. *Abbott* v. *Wood*, 13 Me. 115. So where certain rooms in a house are assigned to a tenant for life, and the reversion in these belongs, with the rest of the house, to another, the parties are not tenants in common. *Wiggin* v. *Wiggin*, 43 N. H. 561.

§ 3. **Tenancy, how created.** The creation of an estate in joint tenancy depends on the wording of the deed or devise by which the tenants claim title, as such an estate can only arise by purchase or act of the parties, and never by descent or act of the law. 1 Broom & Had. Com. (Wait's ed.) 640. A joint tenancy may, however, be created as well by disseizin as by deed or devise. *Putney* v. *Dresser*, 2 Metc. (Mass.) 583, 586. Joint tenancies are not favored at law, nor in equity, and a joint tenancy will never be inferred where a testator meant division. *Martin* v. *Smith*, 5 Binn. (Penn.) 16.

A devise to the wife for life with the remainder to the testator's daughters, his heirs-at-law, their heirs, executors and administrators, makes them joint tenants. *Campbell* v. *Heron*, 1 Tayl. (N. C.) 199. And see *Dott* v. *Willson*, 1 Bay (S. C.), 457. So, a conveyance in mortgage to several persons in fee, to secure the payment of a debt due to the mortgagees jointly, creates a joint tenancy (*Donnels* v. *Edwards*, 2 Pick. 617); and the assignment of a mortgage to two, as trustees of an unincorporated society, vests the title in them as joint tenants. *Webster* v. *Vandeventer*, 6 Gray, 428.

Tenancy in common may be created either by the destruction of the two other estates, in joint tenancy and coparcenary, or by special limitations in a deed or will, or by a conveyance of an undivided share by the owner of the whole. 1 Broom & Had. Com. (Wait's ed.) 651. In a will, the construction of which is less strict than that of a deed, any gift imputing a division or distribution (*Ackerman* v. *Burrows*, 3 Ves. & B. 54; *Phillips* v. *Phillips*, 2 Vern. 430); or containing words denoting equality of interest, will confer a tenancy in common. *Harrison* v. *Foreman*, 5 Ves. 206. And it may be generally stated that, in this country, wherever two or more persons acquire the same estate by the same act, deed or devise, and no indication is therein made to the contrary, they will hold as tenants in common. 1 Washb. Real Prop. 416. And see *Wiswall* v. *Wilkins*, 5 Vt. 87; *Briscoe* v. *McGee*, 2 J. J. Marsh. (Ky.) 370; *Partridge* v. *Colegate*, 3 Har. & McH. (Md.) 339; *Miller* v. *Miller*, 16 Mass. 59; *Evans* v. *Brittain*, 3 Serg. & R. 135. And where a deed in form creates a joint tenancy in the grantees, yet a court of equity will construe it to be a tenancy in common, where it appears that the purchase was made for the purpose of making great improvements thereon. *Duncan* v. *Forrer*, 6 Binn (Penn.) 193.

When a mortgage is given to two or more persons to secure debts due to them severally, it creates a tenancy in common and not a joint tenancy. *Brown* v. *Bates*, 55 Me. 520. And if a mortgage be foreclosed and the estate becomes absolute in the mortgagees, they become tenants in common. *Goodwin* v. *Richardson*, 11 Mass. 469. One in possession under a tenant in dower, holding over after her death, and purchasing the shares of some of the reversioners, becomes a tenant in common with the other reversioners (*Liscomb* v. *Root*, 8 Pick. 376); and one of several remaindermen may convey his interest and the purchaser becomes tenant in common with the rest. *Coleman* v. *Lane*, 26 Ga. 515. Where a testator devised a portion of his land to each of two sons, and directed the residue to be sold and the proceeds divided between others, it was held that the two sons might be regarded as tenants in common with those claiming the residue. *Harvey* v. *Harvey*, 72 N. C. 570.

By a devise of the income of one-third part of a farm, the devisee becomes a tenant in common of that portion of the land itself. *Andrews* v. *Boyd*, 5 Me. 199. And a deed of land to two persons, by one common boundary, but stating the particular interest conveyed to each, constitutes them tenants in common and not joint tenants. *Craig* v. *Taylor*, 6 B. Monr. (Ky.) 457. So, a devise of a tract of land to the two sons of the devisor, and their heirs and assigns until a third son personally appears and demands the land, makes the two sons tenants in common. *McPherson* v. *McPherson*, Add. (Penn.) 327. And a devise of land to "three children, to be kept as joint stock until the youngest shall arrive at the age of twenty-one years, and then the whole property and its increase to be divided equally between them, to each one-third part," creates a tenancy in common and not a joint tenancy. *Weir* v. *Humphries*, 4 Ired. (N. C.) Eq. 264. So, a devise of land to several brothers "according to quantity and quality, each taking possession of his part when he comes of age; but if one or more of them should die before they come of age, then their part to be equally divided among the survivors," was held to create an estate in common. *Harrison* v. *Botts*, 4 Bibb (Ky.), 420.

A deed to a trustee, in trust for a woman and the heirs of her deceased husband (there being but a single child), conveys an estate in common for the benefit of the woman and child. *Bazemore* v. *Davis*, 55 Ga. 504.

§ 4. **What may be held in common.** There may be a joint tenancy, or a tenancy in common, not only of lands and tenements (instances of which are given in the preceding sections), but also of chattels personal, as well as real. See *ante*, Vol. 2, pp. 246, 248. And

there may be a tenancy in common of an inchoate, as well as of a perfect right. *Wilkins* v. *Burton*, 5 Vt. 76.

It has been held that, where one furnishes materials to another for the making of a machine, on an agreement that he should have a property therein, in the proportion that the sum advanced by him would bear to the whole value, he becomes thereby tenant in common with the maker. *Beaumont* v. *Crane*, 14 Mass. 400. And where several persons signed a contract, agreeing to take an interest in a voyage, and a vessel was purchased and fitted out by their agents, the associate signers of the contract were held to be tenants in common, and not partners. *French* v. *Price*, 24 Pick. 13. So, part owners of a steamboat are generally to be considered as tenants in common, and not as joint owners or special partners. *Knox* v. *Campbell*, 1 Penn. St. 366. See, also, *Thorndike* v. *De Wolf*, 6 Pick. 120.

If the owner of land build a house partly on his own land and partly on land adjoining, under an agreement between the owners that he shall repay himself the cost out of the rent, they are not tenants in common of the house, but the title follows the title to the land. *M'Adam* v. *Orr*, 4 Watts & Serg. 550. And see *Hurd* v. *Cushing*, 7 Pick. 169. So, if two persons have a party-wall, one-half of the thickness of which stands on the land of each, they are not, therefore, tenants in common of the wall, or of the land on which it stands, although the wall was erected at the joint expense of the two proprietors. The wall in such case follows the property of the soil on which it was built. *Matts* v. *Hawkins*, 5 Taunt. 20.

§ 5. **Nature and incidents of such tenancy.** The following circumstances are requisite to a joint tenancy: namely, unity of interest, unity of title, unity of time, and unity of possession; or, in other words, joint tenants have one and the same interest, accruing by one and the same conveyance, commencing at one and the same time, and held by one and the same undivided possession. 1 Broom & Had. Com. (Wait's ed.) 640. This union and entirety of interest between joint tenants has given rise to several incidents peculiar to this estate, the first and most important of which is, the right of survivorship, "by which, when two or more persons are seized of a joint estate of inheritance for their own lives or *pur autre vie*, or are jointly possessed of any chattel interest, the entire tenancy upon the decease of any one of them remains to the survivors, and at length to the last survivor, and he shall be entitled to the whole estate." Id. And see *De Witt* v. *San Francisco*, 2 Cal. 289. This right of survivorship incident to joint tenancy was never favored in equity (see *Rigden* v. *Vallier*, 3 Atk. 734); and the principal use of a joint tenancy now in England, is

said to be for the purpose of vesting estates in trustees, who are there invariably made joint tenants. Wms. Real Prop. 111. The policy of the American law is likewise opposed to the doctrine of survivorship; and in many of the States the rule of survivorship is abolished by statute, except in the case of joint trustees, while in others all estates to two or more persons are taken to be tenancies in common, unless expressly declared to be joint tenancies by the deed or instrument creating them, with a similar exception of estates to joint trustees. See 1 Washb. on Real Prop. 408; 4 Kent's Com. 361; *Sergeant* v. *Steinberger*, 2 Ohio, 305; *Parsons* v. *Boyd*, 20 Ala. 112; *Nichols* v. *Denny*, 37 Miss. 59; *Lowe* v. *Brooks*, 23 Ga. 325; *Rogers* v. *Grider*, 1 Dana (Ky.), 242; *Berdan* v. *Van Riper*, 16 N. J. Law, 7; *Ball* v. *Deas*, 2 Strobh. (S. C.) Eq. 24. And on this subject the statute law of the particular State should be consulted. Other incidents of a joint tenancy are, that an entry or re-entry made by one is deemed to be the entry of all (Co. Litt. 319, 364); so livery of seizin made to one joint tenant will inure to all of them (id. 49); and the occupation by one is *prima facie* an occupation by all. *Ford* v. *Grey*, 1 Salk. 285; S. C., 6 Mod. 44; *Wiswall* v. *Wilkins*, 5 Vt. 87; *Small* v. *Clifford*, 38 Me. 213. See *Taylor* v. *Cox*, 2 B. Monr. (Ky.) 429. So, upon the same principle of identity of interest, if an adverse title to the joint estate, or if an older legal title to it, is purchased by one of the joint tenants, the benefit of such purchase will inure to his co-tenants, provided they contribute ratably toward paying the expenses of the purchase. *Gossom* v. *Donaldson*, 18 id. 230; *Brittin* v. *Handy*, 20 Ark. 381; *Lloyd* v. *Lynch*, 28 Penn. St. 419; *Page* v. *Webster*, 8 Mich. 263.

Tenants in common properly take by distinct moieties and have no entirety of interest, and therefore there is no survivorship between them. Lands may be held in common, though one tenant holds by a feudal tenure and the other in pure allodium. *Putnam* v. *Ritchie*, 6 Paige, 390. So, there is no unity of title nor unity of time between them; but a unity of possession is an essential attribute of a tenancy in common. See *ante*, 169, § 1; *Bernecker* v. *Miller*, 40 Mo. 473; *Blessing* v. *House*, 3 Gill & J. (Md.) 290; *Story* v. *Saunders*, 8 Humph. (Tenn.) 663. And tenants in common as well as joint tenants are compellable in equity to make partition of their lands. See *Potter* v. *Wheeler*, 13 Mass. 504; *Higginbottom* v. *Short*, 25 Miss. 160; *Ledbetter* v. *Gash*, 8 Ired. 462.

The relation between tenants in common is said to be in principle very similar to that between lessor and lessee. *Willison* v. *Watkins*, 3 Pet. 51. The possession of one is the possession of the other; but

if one ousts the other or denies his tenure, his possession becomes adverse. Id.; *Coleman* v. *Clements*, 23 Cal. 245; *Allen* v. *Hall*, 1 McCord (S. C.), 131; *Thornton* v. *York Bank*, 45 Me. 158; *Brown* v. *Wood*, 17 Mass. 68. See *post*, 178, § 9.

§ 6. **Rights and powers.** With respect to the estate of joint tenants, as between themselves, each is entitled to his share of the rents and profits while he lives, subject, however, to the right of the survivor or survivors to take the entire estate upon his death, to the exclusion of his heirs or personal representatives. Wms. Real Prop. 109. Either tenant may convey his share to a co-tenant or even to a stranger. See *Rector* v. *Waugh*, 17 Mo. 13. But a devise by one joint tenant of his share will be inoperative, inasmuch as the righ of survivorship takes precedence of such devise. 1 Washb. on Real Prop. 412; *Duncan* v. *Forrer*, 6 Binn. (Penn.) 193. And one joint tenant cannot bind his co-tenant in a contract for the sale of their joint real estate, without express authority from the co-tenant anterior to the contract, or a ratification of the contract by the co-tenant afterward. *Hanks* v. *Enloe*, 33 Tex. 624.

Each tenant in common in respect to his share of the estate has all the rights, except that of sole possession, which a tenant in severalty would have. And he may manage his estate in any way he pleases, provided he does not injure his co-tenants. *Peabody* v. *Minot*, 24 Pick. 329. He may demise or convey his undivided share (*Shepardson* v. *Rowland*, 28 Wis. 108); but as a general rule, he may not demise or convey his share in any particular part of the estate held in common by metes and bounds, if objected to by his co-tenants, though it would be valid and effectual as against himself and all persons claiming under him. Id.; *Crocker* v. *Tiffany*, 9 R. I. 505; *Ballou* v. *Hale*, 47 N. H. 347; *Boston, etc., Co.* v. *Condit*, 19 N. J. Eq. 394; *Good* v. *Coombs*, 28 Tex. 34; *Mattox* v. *Hightshue*, 39 Ind. 95; *Tainter* v. *Cole*, 120 Mass. 162. In Ohio, a tenant in common may, however, convey his share in a particular part of the estate (*Treon's Lessee* v. *Emerick*, 6 Ohio, 391); so, in Maryland (*Reinicker* v. *Smith*, 2 Har. & J. 421); and so in Missouri. *Barnhart* v. *Campbell*, 50 Mo. 597.

As a general rule, a joint tenant or tenant in common is not permitted to purchase in an outstanding adverse title to the common property for his own benefit to the exclusion of his co-tenant. But the co-tenant must, within a reasonable time, make his election to claim the benefit, and to contribute to the expense incurred in the purchase of such title. And if he unreasonably delays until there is a change in the condition of the property, or in the circumstances of the

parties, he will be held to have abandoned all benefit arising from the new acquisition. *Buchanan* v. *King's Heirs*, 22 Gratt. (Va.) 414; *Brown* v. *Homan*, 1 Neb. 448; *Mandeville* v. *Solomon*, 39 Cal. 125.

One tenant in common has a right to take possession of the premises owned in common; and although such possession is acquired by stealth, yet if without tumult or breach of the peace, it will not be illegal. *Wood* v. *Phillips*, 43 N. Y. (4 Hand) 152.

§ 7. **Duties and liabilities.** A tenant in common, occupying the same common property without any agreement to pay rent, is not liable for rent to his co-tenants, even though a partner occupied with him. If he agrees with any of his co-tenants to pay rent, he is liable only to those with whom he so agrees, and he cannot set off the costs of improvements and additions, not strictly repairs, against such rent. *Scott* v. *Guernsey*, 60 Barb. 163; S. C. affirmed, 48 N. Y. (3 Sick.) 106.

Each co-tenant is equally bound to keep the taxes paid (*Morgan* v. *Herrick*, 21 Ill. 481); and the common law makes it the duty of tenants in common mutually to contribute to the reparation of houses, mills, etc., held in common. *Anderson* v. *Greble*, 1 Ashm. (Penn.) 136. Thus, a tenant in common, for life, of one-third part of real estate, is bound by the law to pay one-third of the taxes assessed thereon, and one-third of the expenses of the necessary repairs of the premises made for the common good. Id. So, one tenant in common of a chattel may recover from another any money expended on it beyond his due proportion. *Gardner* v. *Cleveland*, 9 Pick. 334. But there must be a previous request to join in making the repairs, unless there is some prescription or agreement binding either party exclusively to make the repairs *Calvert* v. *Aldrich*, 99 Mass. 74. And see *Kidder* v. *Rixford*, 16 Vt. 169; *Crest* v. *Jack*, 3 Watts, 238; *Thurston* v. *Dickinson*, 2 Rich. (S. C.) Eq. 317. One tenant in common who pays all the taxes can claim to be reimbursed with interest. *Morgan* v. *Herrick*, 21 Ill. 481; *Oliver* v. *Montgomery*, 39 Iowa, 601. And one joint tenant of real estate, who makes improvements thereon with the understanding that the other is to furnish his share of the cost thereof, is entitled to interest on advances furnished by him beyond his proportion. *Sears* v. *Munson*, 23 Iowa, 380.

If one tenant in common, authorized to improve the property, acts prudently and in good faith, he is not to be held responsible to the other for errors of judgment, either as to the character or the construction of the improvements, but will be entitled to contribution from his co-tenant. *Reed* v. *Jones*, 8 Wis. 421. And see *Hall* v. *Piddock*, 21 N. J. Eq. 311.

§ 8. **Transfer of title.** Although a conveyance, by one co-tenant or joint tenant, of a part of the land, by metes and bounds, to a stranger, can have no legal effect or operation to the prejudice of a co-tenant (see *ante*, 179, § 6), yet where several persons are tenants in common of separate and distinct parcels of land, one of them may convey all his undivided interest in the whole of any one of the distinct parcels, and his deed will be valid and effectual against his co-tenants. Id.; *Primm* v. *Walker*, 38 Mo. 74. See *Gates* v. *Salmon*, 35 Cal. 576; *Hartford, etc., Ore Co.* v. *Miller*, 41 Conn. 112; *Whitton* v. *Whitton*, 38 N. H. 127; *Duncan* v. *Sylvester*, 24 Me. 482; *McKey* v. *Welch*, 22 Tex. 390; *Cox* v. *McMullin*, 14 Gratt. (Va.) 182; *Nichols* v. *Smith*, 22 Pick. 316; *Jewett* v. *Stockton*, 3 Yerg. (Tenn.) 492. So, it has been held that where an inheritance consists of several distinct freeholds, a tenant in common may convey his undivided interest in any one or more of them, and it may be sold on execution without reference to any of the other parcels. *Butler* v. *Roys*, 25 Mich. 53; S. C., 12 Am. Rep. 218.

The acts of one tenant in common cannot amount to the dedication of part of the common property as a public highway against the other co-tenants. *Scott* v. *State*, 1 Sneed (Tenn.), 629. So, a title to one undivided third part of a lot as tenant in common does not authorize the holder thereof to set apart any portion of the lot for a private way for himself as if he were sole owner. *Reed* v. *West*, 16 Gray, 283.

Nor can a tenant in common, without authority from his co-tenants, execute a lease that will bind them. *Mussey* v. *Holt*, 24 N. H. 248. See also, *ante*, 176, § 6. And a mortgage made by a tenant in common of an undivided interest in a specified parcel of land is invalid as against his co-tenants. *Marks* v. *Sewall*, 120 Mass. 174.

§ 9. **Adverse possession, disseisin or ouster.** The entry and possession of one tenant in common of and into the land held in common, is ordinarily deemed the entry and possession of all the tenants; and this presumption will prevail in favor of all, until some notorious act of ouster or adverse possession is brought home to the knowledge or notice of the others. When this occurs, the possession is from that period treated as adverse to the other tenants, and it will afterward be as operative against them as if the party had entered under an adverse title. *Clymer's Lessee* v. *Dawkins*, 3 How. (U. S.) 674. And see *ante*, 174, § 5; *Harpending* v. *Dutch Church*, 16 Pet. 455. Whether a tenant in common entered upon the estate, claiming an exclusive right, and ousted his co-tenant, is held to be a question of fact. *Blackmore* v. *Gregg*, 2 Watts & Serg. 182; *Cummings* v. *Wyman*, 10 Mass. 464. See *Newell* v. *Woodruff*, 30 Conn. 492. An entry upon, and

possession of, the whole of the land by one tenant in common, as if it had been his exclusive property, and the receipt of the rents and profits thereof, without accounting to his co-tenant for any part thereof, or proof of a demand to do so, amounts to an actual ouster. *Law* v. *Patterson*, 1 Watts & Serg. 184; *Bigelow* v. *Jones*, 10 Pick. 161. So, an ouster will be presumed between tenants in common, in favor of one who has had peaceable possession, and received the profits for the length of time which the statute of limitations prescribes as a bar. *Mehaffy* v. *Dobbs*, 9 Watts, 363. And see *Johnson* v. *Toulmin*, 18 Ala. 50; *Gray* v. *Givens*, Riley (S. C.), 41; *Peeler* v. *Guilkey*, 27 Tex. 355. And see *Linker* v. *Benson*, 67 N. C. 160; *Marr* v. *Gilliam*, 1 Coldw. (Tenn.) 488. And a tenant in common who refuses to pay rent, when demanded by his co-tenant, and claims the whole of the land, will be considered as an adverse occupant. *Phillips* v. *Gregg*, 10 Watts, 158.

A co-tenant may be ousted, by denying or resisting his right, or by excluding him from the enjoyment of the property. *Thomas* v. *Pickering*, 13 Me. 337. And it is a general rule, that when one enters into the possession of land under a deed duly recorded, claiming title to the whole tract specified in the deed, and exercises the usual acts of ownership over it, such possession is adverse to all persons who claim title to the same land, although such persons may have been tenants in common. *Horne* v. *Howell*, 46 Ga. 9. And see *Nichols* v. *Smith*, 22 Pick. 316; *Jeffers* v. *Radcliffe*, 10 N. H. 242; *Jewett* v. *Stockton*, 3 Yerg. (Tenn.) 492. See *ante*, Vol. 3, 103.

The peaceable possession of one tenant in common, accompanied with no act which can amount to an ouster, will not be construed as an adverse possession. *Challefoux* v. *Ducharme*, 4 Wis. 554; S. C., 8 id. 287; *McClung* v. *Ross*, 5 Wheat. 116; *Colburn* v. *Mason*, 25 Me. 434; *Whiting* v. *Dewey*, 15 Pick. 428; *Chandler* v. *Ricker*, 49 Vt. 128; *Squires* v. *Clark*, 17 Kans. 84. But where, by some notorious act, he claims an exclusive right, though it be under a title which is void, his possession becomes adverse and the statute of limitations will run. *Jackson* v. *Tibbits*, 9 Cow. 241. And see *Wood* v. *Phillips*, 43 N. Y. (3 Hand) 152; *Anders* v. *Anders*, 9 Ired. (N. C.) L. 214; *Abercrombie* v. *Baldwin*, 15 Ala. 363; *Bowen* v. *Preston*, 48 Ind. 367; *Goeway* v. *Urig*, 18 Ill. 238; *Warfield* v. *Lindell*, 38 Mo. 561. *Ante*, Vol. 3, 103. And an adverse possession against two tenants in common, one of whom is within the saving of the statute of limitations, operates against the other. *Doolittle* v. *Blakesly*, 4 Day (Conn.), 265.

It has been held that the actual possession of land, under a deed which purports to convey the whole thereof, and under a belief that it does con-

vey the whole, when in fact it gives title to an undivided portion only, is not an ouster of the tenant in common who owns the other undivided part. *Seaton* v. *Son*, 32 Cal. 481. Nor does the payment of taxes on an undivided third, or a conveyance by metes and bounds, not followed by actual entry and possession, constitute an actual ouster by one tenant in common of his co-tenant. *Hannon* v. *Hannah*, 9 Gratt. (Va.) 146. And the mortgage of the whole estate by one tenant in common is not conclusive evidence of an ouster of the other tenants. *Hodydon* v. *Shannon*, 44 N. H. 572. And see *Leach* v. *Beattie*, 33 Vt. 195. So, an acknowledgment by the widow and one of the co-heirs in possession, that the party claiming was the owner of the premises, and that they held under him, is not sufficient to establish an ouster by such party of his co-heirs. *Forward* v. *Deetz*, 32 Penn. St. 69. See *Alexander* v. *Kennedy*, 19 Tex. 488.

§ 10. **What acts bind both, or are for the benefit of both.** Payment of taxes by one tenant in common, on the joint property, inures to the benefit of all, and is considered as payment by them all. *Chickering* v. *Faile*, 38 Ill. 342; *Dubois* v. *Campau*, 24 Mich. 360; *Halsey* v. *Blood*, 29 Penn. St. 318. And one tenant in common may redeem land sold for non-payment of taxes. *Watkins* v. *Eaton*, 30 Me. 529. But after the time for redemption has passed, the subsequent purchase of the land by one of two tenants in common will not inure to the benefit of the other. *Reinboth* v. *Zerbe Run Improvement Co.*, 29 Penn. St. 139. And see *Coleman* v. *Coleman*, 3 Dana (Ky.), 398. If a co-tenant obtain an outstanding title or incumbrance against the common property it will, at the election of his fellows, be for their benefit, although the purchase be made in the name of another. *Duff* v. *Wilson*, 72 Penn. St. 442; *Rothwell* v. *Dewees*, 2 Black (U. S.), 613; *Gossom* v. *Donaldson*, 18 B. Monr. 230. And see *ante*, 176, § 6. And where one who is, either in law or equity, a tenant in common, makes an entry upon the land, his entry is presumed to have been for his co-tenants as well as himself, and his possession thus acquired is co-extensive with their common right. *Poage* v. *Chinn*, 4 Dana (Ky.), 50; *Baily* v. *Trammell*, 27 Tex. 317. And see the preceding section. So, if a person enter upon land owned by tenants in common, by license of one of them, and erect and occupy a building thereon, he must be considered as holding in submission to their title until the contrary is shown. *Bucknam* v. *Bucknam*, 30 Me. 494. See, also, *Berthold* v. *Fox*, 13 Minn. 501.

A license given by one tenant in common to cut timber, having himself a right to cut timber on the estate held in common, was held to bind his co-tenant. *Baker* v. *Wheeler*, 8 Wend. 505. And see *Shep-*

herd v. *Young*, 2 La. Ann. 238. So, a discharge of rent by some of the tenants in common was adjudged to bind their co-tenant. *Sherman* v. *Ballou*, 8 Cow. 304. And it is held that one tenant in common of land has authority to settle with a trespasser upon the lands for the trespass and release him from his liability, and the settlement and release will be binding upon his co-tenants. *Bradley* v. *Boynton*, 22 Me. 287. But if one tenant in common of property use it to the nuisance of a stranger, his co-tenants, not actually participating in the wrong, are not liable. *Simpson* v. *Seavey*, 8 Me. 138.

A tenant in common of a well has a right to send his servant down into it for the purpose of cleaning it out, if he has reason to suppose that the bottom is filthy. *Newton* v. *Newton*, 17 Pick. 201. But if there be two tenants in common of a dwelling-house, severally furnishing and occupying different apartments, one has no right to disturb the other's occupation by removing his furniture. *Keay* v. *Goodwin*, 16 Mass. 1. Nor has a tenant in common any right, by means of a dam erected on other lands of which he is sole seized, to flow land owned in common without consent of his co-tenants, nor can he, by grant of land of which he is sole seized, convey such right of flowage to his grantee. *Great Falls Co.* v. *Worster*, 15 N. H. 412; *Hutchinson* v. *Chase*, 39 Me. 508.

The acts of one tenant in common in locating lands under a deed will not affect his co-tenants, unless it appears that they sanctioned his acts. *Jackson* v. *Moore*, 6 Cow. 706. And see *Keen* v. *Casey*, 22 Tex. 412. Nor are tenants in common of land bound by the acts of a co-tenant in accepting the balance of the purchase-money and promising a deed, after the right thereto had become forfeited. *Pearis* v. *Covillaud*, 6 Cal. 617.

In the case of a farm worked on shares each co-tenant is entitled to the whole of the crop as against all persons but his co-tenant, and can maintain a suit for its recovery. *Knox* v. *Marshall*, 19 Cal. 617.

§ 11. **Actions against third persons.** Joint tenants must join in an action for the possession of land jointly held, and the failure to do so is fatal to a recovery. 5 Bac. Abr., 299, Joint Ten. K.; *Dewey* v. *Lambier*, 7 Cal. 347. *Ante*, Vol. 3. 41, 42. So, joint tenants and tenants in common of a chattel must join in an action for the recovery of it or its value. *Smoot* v. *Wathen*, 8 Mo. 522; *Haskell* v. *Jones*, 24 Me. 222; *Hill* v. *Gibbs*, 5 Hill, 56. But if one joint tenant or tenant in common sues alone for a chattel, and the defendant does not plead in abatement, the plaintiff may have judgment for his part, but not for the whole. *Frazier* v. *Spear*, 2 Bibb (Ky.), 385.

It is the general rule of the common law that tenants in common

must sever in real actions, because their estates are several. *Covillaud* v. *Tanner*, 7 Cal. 38; *Stevenson* v. *Cofferin*, 20 N. H. 150; *May* v. *Parker*, 12 Pick. 34; *Dawson* v. *Mills*, 32 Penn. St. 302. *Ante*, Vol. 3, 41. But they must join in any personal action, even for an injury to their real estate, because the damages belong to them jointly. *Bullock* v. *Hayward*, 10 Allen, 460. And see *Winters* v. *McGhee*, 3 Sneed (Tenn.), 128; *Tucker* v. *Campbell*, 36 Me. 346; *Lane* v. *Dobyns*, 11 Mo. 105; *DePuy* v. *Strong*, 37 N. Y. (10 Tiff.) 372; *Johnson* v. *Goodwin*, 27 Vt. 288. But one tenant in common of personal property may sustain trover against an officer for his individual moiety of the property, when the officer has sold the whole property upon execution against the co-tenant. *White* v. *Morton*, 22 Vt. 15. So, the owner of an undivided portion of a ground rent may maintain a separate action of covenant for his portion of the arrears. *Cook* v. *Brightly*, 46 Penn. St. 439. And a tenant in common in possession may let his share of the common property, and, therefore, in an action to recover the rent the co-tenant need not be joined as a plaintiff. *Hayden* v. *Patterson*, 51 id. 261.

So, one tenant in common of real estate may recover the entire common property in ejectment as against a stranger. *Hart* v. *Robertson*, 21 Cal. 346; *Sharon* v. *Davidson*, 4 Nev. 416; *Dolph* v. *Barney*, 5 Oreg. 191.

§ 12. **Actions by third persons against them.** It is the rule of the common law, that for any thing respecting the land held in common, joint tenants and tenants in common should be sued jointly in trespass, trover, or case. And if one only be sued, he may plead the joint tenancy in abatement (1 Wms. Saund. 291 *f*); but it would be otherwise in a mere personal action of tort. Id.; *Mitchell* v. *Tarbutt*, 5 Term R. 649, 651.

§ 13. **Actions between tenants.** Ejectment will lie by one joint tenant or tenant in common of realty against the other, in the case of an actual ouster (*Peaceable* v. *Read*, 1 East, 568; *Bethell* v. *McCool*, 46 Ind. 303; *Halford* v. *Tetherow*, 2 Jones [N. C.], 393; *Noble* v. *McFarland*, 51 Ill. 226. See *Jamison* v. *Graham*, 57 id. 94); and after a recovery in such action, trespass for mesne profits may be brought. *Goodtitle* v. *Tombs*, 3 Wils. 118; *Cook* v. *Webb*, 21 Minn. 428. So, trespass will lie where there has been a total destruction of the subject-matter of the tenancy in common. *Cubitt* v. *Porter*, 8 B. & C. 268; S. C., 2 M. & Ry. 272; *Voyce* v. *Voyce*, Gow. 201. But, with these two exceptions, one tenant in common cannot maintain an action of trespass against his co-tenant. *Bennet* v. *Bullock*, 35 Penn. St. 364. And see *Hastings* v. *Hastings*, 110 Mass. 285; *Roberts* v.

McGraw, 11 Bush (Ky.), 26. But see *Murray* v. *Hall*, 7 C. B. 441; *Erwin* v. *Olmsted*, 7 Cow. 229; *Jefcoat* v. *Knotts*, 13 Rich. (S. C.) 50; *McGill* v. *Ash*, 7 Penn. St. 397; *Thompson* v. *Gerrish*, 57 N. H. 85, which hold that trespass *quare clausum fregit* lies by one tenant in common against his co-tenant, where an actual ouster is proved. One tenant in common cannot recover in *assumpsit* against his fellow for the use and occupation of the common property, without an express contract to pay rent. *Kline* v. *Jacobs*, 68 Penn. St. 57; *Crow* v. *Mark*, 52 Ill. 332. And see *Bulger* v. *Woods*, 3 Pinn. (Wis.) 460; *Israel* v. *Israel*, 30 Md. 120. But it is held, that an action on the case sounding in tort may be maintained by one tenant in common, against his co-tenant, for a misuse of the common property, though not amounting to a total destruction of it. *McLellan* v. *Jenness*, 43 Vt. 183; S. C., 5 Am. Rep. 270. And see *Agnew* v. *Johnson*, 17 Penn. St. 373; *Lowe* v. *Miller*, 3 Gratt. (Va.) 205. And if one tenant in common assume to own and sell the thing held in common, the other may maintain an action of trover against him. *Small* v. *Robinson*, 9 Hun, 418; *Smith* v. *Tankersley*, 20 Ala. 212; *Burbank* v. *Crooker*, 7 Gray, 159; *Wheeler* v. *Wheeler*, 33 Me. 347; *Coursin's Appeal*, 79 Penn. St. 220; *White* v. *Osborn*, 21 Wend. 72. But see *Barton* v. *Burton*, 27 Vt. 93. See *Hewlett* v. *Owens*, 50 Cal. 475; 51 id. 570.

To entitle a tenant in common to an account of rents and profits from his co-tenant, for the use and occupation of premises held in common, he must show exclusive possession of the premises, or that some profit has been derived therefrom for which the co-tenant ought to account. *Barrell* v. *Barrell*, 25 N. J. Eq. 173; *Buckelew* v. *Snedeker*, 27 id. 82; *Graham* v. *Pierce*, 19 Gratt. (Va.) 28.

One of several co-tenants receiving rents from the common property is liable for interest on the amount so received, to his co-tenants, according to their several proportions. And an action will lie for its recovery without a previous demand. *Scott* v. *Guernsey*, 60 Barb. 163; S. C. affirmed, 48 N. Y. (3 Sick.) 106. And the rule that a tenant in common is not liable to his co-tenant for rents and profits of the land received by him, unless he received more than his share (see *ante*, 177, § 7), is held to have no application where he disseizes his co-tenant and ousts him of the possession. *Sears* v. *Sellew*, 28 Iowa, 501. See *Bird* v. *Bird*, 15 Fla. 424; S. C., 21 Am. Rep. 296; *Bazemore* v. *Davis*, 55 Ga. 504.

Where one joint owner of personal property assumes, without authority, to sell the interest of other owners, they may repudiate such sale and sue for the conversion of the property, or they may ratify it and sue for their share of the money received. *Small* v. *Robinson*, 9 Hun, 419.

CHAPTER LXXXVII.

JUDGMENTS.

ARTICLE I.

OF ACTIONS UPON JUDGMENTS.

Section 1. In general. Judgments are either interlocutory or final. A final judgment is the final determination of the rights of the parties in an action. This is the definition adopted under the Code statutes of several of the States. A final decree may be defined as the final determination of the rights of parties in a suit conducted according to the methods and principles of courts of equity. Where, however, but one form of civil action is known, as under the Code system, the term "judgment" includes decrees in equity.

A judgment has been said to be a contract. *Morse* v. *Toppan*, 3 Gray (Mass.), 411; *Stuart* v. *Lander*, 16 Cal. 372. Thus, a judgment is regarded as a contract within the meaning of the statute giving justices jurisdiction of actions arising on contract for the payment of money. *McGuire* v. *Gallagher*, 2 Sandf. (N. Y.) 402. Whether the obligation of a contract be regarded as arising from an implied contract, or from the legal effect of the judicial determination irrespective of any implication of consent, it is still such an obligation as will sustain an action of debt and furnish the highest and most satisfactory evidence to support the action. The right of action seems, however, to arise from the existence, not of a contract, but of a circumstance, namely, the recovery of a judgment, which enables the plaintiff to sue the defendant as if there had been a contract between them; *i. e.*, it is a right *quasi ex contractu*. Dicey on Parties, p. 16.

A judgment creditor has a common law right to sue upon his judgment as soon as it is rendered (*Hale* v. *Angel*, 20 Johns. 342; *Smith* v. *Mumford*, 9 Cow. 26; *contra*, *Pitzer* v. *Russel*, 4 Oreg. 124; *Smith* v. *Belmont, etc., Iron Co.*, 11 Bush [Ky.], 390), even though the judgment be for costs merely. *Ives* v. *Finch*, 28 Conn. 112; *Denison* v. *Williams*, 4 id. 402. And this is true quite irrespective of the fact that the judgment may be enforced by other remedies, as by execution. *Simpson* v. *Cochran*, 23 Iowa, 81; *Thomson* v. *Lee*

County, 22 id. 206; *Haven* v. *Baldwin*, 5 id. 503; *Clark* v. *Goodwin*, 14 Mass. 237; *Linton* v. *Hurley*, 114 id. 76; *Headley* v. *Roby*, 6 Ohio, 521. The arrest of the judgment debtor, so long as it continues, is a defense (*Chapman* v. *Hatt*, 11 Wend. 41; *Kinsman* v. *Page*, 22 Vt. 628); but an arrest, after the action on the judgment was commenced, was held not to prevent a recovery on the judgment. *Moor* v. *Towle*, 38 Me. 133. After a valid levy under an execution on the judgment, the right of action on the judgment is suspended. *Lawrence* v. *Pond*, 17 Mass. 433. The action may be brought before the expiration of the time allowed to the sheriff to return the execution, if the execution has been in fact returned. *Renaud* v. *O'Brien*, 35 N. Y. (8 Tiff.) 99.

Actions on domestic judgments are not favored (*Biddleson* v. *Whitel*, 1 W. Black. 507); because they ordinarily serve no purpose which could not be secured by a more simple and less costly method. *Burnes* v. *Simpson*, 9 Kan. 663. Hence under the English statute (43 Geo. 3, ch. 46, § 4), the plaintiff in an action on a judgment is not entitled to costs except by special order, and in some of the States no such action can be maintained unless special leave of the court is first obtained (see *post*, 187, § 4); but a foreign judgment can be enforced only by action. *Succession of Beckham*, 16 La. Ann. 352. Indeed, the only effect of a foreign judgment, outside of the jurisdiction of the court in which it is rendered is, that it entitles the plaintiff to a new decree. *Davis* v. *Headley*, 22 N. J. Eq. 115, 121.

In an action upon a judgment, in a case where the judgment roll has been lost or destroyed, secondary evidence may be given of its contents. *Mandeville* v. *Reynolds*, 68 N. Y. (23 Sick.) 528.

§ 2. **Who may sue.** The right of action on a judgment in favor of the original plaintiff exists as a matter of course, subject to restrictions by statute. See *ante*, 184, § 1; *post*, 187, § 4.

But at common law a judgment is not assignable so as to authorize the assignee to maintain an action on it in his own name. The action is properly brought in the name of the judgment creditor. *Goodrich* v. *Stevens*, 116 Mass. 170; *Moore* v. *Coughlin*, 4 Allen, 335; *Elliott* v. *Waring*, 5 Monr. (Ky.) 338; *Triplett* v. *Scott*, 12 Ill. 137. See *Tufts* v. *Braisted*, 4 Duer (N. Y.), 607. But under the provision of the Code, that every action shall be prosecuted in the name of the real party in interest, the assignee of a judgment may maintain an action in his own name. *Tufts* v. *Braisted*, 4 Duer (N. Y.), 607; *Charles* v. *Haskins*, 11 Iowa, 329.

In Kentucky it has been held that the assignee of a judgment has no

right to a second judgment, but must proceed upon the first. *Smith* v. *Belmont & Nelson Iron Co.*, 11 Bush (Ky.), 390.

The assignee of a judgment, however, takes it subject to all the equities between the original parties. *Scott* v. *Harkins*, 32 Ga. 302; *McJilton* v. *Love*, 13 Ill. 486; *Robeson* v. *Roberts*, 20 Ind. 155; *Blakesley* v. *Johnson*, 13 Wis. 530. See *McCotter* v. *McCotter*, 16 Abb. Pr. (N. Y.) 265; *Starr* v. *Haskins*, 26 N. J. Eq. 414.

Upon the death of a judgment creditor, the right to enforce the judgment passes to his personal representatives. And this right is enforceable at common law, both by the writ of *scire facias*, and by an action of debt on the judgment. *Carter* v. *Colman*, 12 Ired. 274. No execution upon the original judgment can issue; a new proceeding is therefore essential (*Jay* v. *Martine*, 2 Duer, 654; *Thurston* v. *King*, 1 Abb. [N. Y.] 126; *Cameron* v. *Young*, 6 How. [N. Y.] 372); and the statutory provisions requiring leave to sue upon judgment do not apply to such actions. *Smith* v. *Britton*, 45 How. (N. Y.) 428; *Wheeler* v. *Dakin*, 12 id. 537.

A judgment recovered in favor of one person by mistake for another, cannot be sued upon by the latter even though the mistake be proved. *Gilbert* v. *Hanford*, 13 Mich. 40.

§ 3. **Who may be sued.** A judgment is conclusive upon the parties to the action and their privies. At common law, it is said that a judgment does not survive the defendant against whom it is rendered. By no means known to that law can a judgment be enforced against the administrator of a deceased debtor. As to him, its character as a judgment is *functus officio*. Freeman on Judg., § 438. A remedy against this defect is, however, provided by writ of *scire facias*, and in all the States, ample remedies are provided for enforcing judgments against the estates of deceased judgment debtors.

A judgment against an administrator will not support an action against the heir or devisee, because there is no privity between them (*McCoy* v. *Nichols*, 4 How. [Miss.] 31; *Robertson* v. *Wright*, 17 Gratt. 534; *Dorr* v. *Stockdale*, 19 Iowa, 269); although it furnishes *prima facie* evidence against the realty (*State* v. *Lineberger*, 59 Penn. St. 308; *Sergeant's Heirs* v. *Ewing*, 36 Penn. St. 156); but a judgment against the administrator will not support an action against the administrator and heir. *Nourse's Adm'r* v. *Ramsey*, 2 Bibb (Ky.), 547.

A judgment, void as against one joint debtor, cannot be enforced against the other. *Hall* v. *Williams*, 6 Pick. 232; *Mackay* v. *Gordon*, 34 N. J. Law, 286.

A judgment against two is to be regarded as a joint judgment.

Mahaney v. *Penman*, 4 Duer (N. Y.), 603; *Barnes* v. *Smith*, 16 Abb. Pr. (N. Y.) 420. But see *Read* v. *Jeffries*, 16 Kans. 534.

§ 4. **Leave to sue.** As we have already seen, the recovery of a final judgment creates an immediate right of action on the judgment in favor of the judgment creditor. He may, in this way, multiply actions against the debtor and increase the costs unnecessarily without any substantial advantage in the collection of the debt. In most, if not in all of the States, this right of a judgment creditor has been limited either by requiring him, upon good cause shown, to obtain the leave of the court before bringing an action, or by depriving him of costs. Thus in New York, it is provided (Code, § 71) that no action shall be brought upon a judgment rendered in any court of this State, except a court of a justice of the peace, between the same parties, without leave of the court for good cause shown, on notice to the adverse party; and no action on a judgment rendered by a justice of the peace shall be brought in the same county, within five years after its rendition, except in case of his death, resignation, incapacity to act, or removal from the county, or that the process was not personally served on the defendant, or on all the defendants, or in case of the death of some of the parties, or where the docket or record of such judgment is or shall have been lost or destroyed.

This provision does not, however, apply to a *bona fide* assignee of the judgment who may still sue without leave (*Tufts* v. *Braisted*, 4 Duer, 607; S. C., 1 Abb. Pr. 83; *McButt* v. *Hirsch*, 4 id. 441; *Kopper* v. *Howe*, 2 Hilt. 69); or to an action by an executor or an administrator of a deceased judgment creditor. *Smith* v. *Britton*, 45 How. (N. Y.) 428; *Wheeler* v. *Dakin*, 12 id. 537.

The leave to sue need not require the suit to be brought in the court in which the judgment was rendered. *Nat Mechanics' Bank Ass.* v. *Usher*, 1 Sweeny (N. Y.), 403.

If an action be brought without first obtaining the leave of court, it is an irregularity merely (*Lane* v. *Salter*, 4 Robt. [N. Y.] 239) to be taken advantage of by motion to set aside the summons and complaint. *Finch* v. *Carpenter*, 5 Abb. Pr. (N. Y.) 225; *contra*, *McGuire* v. *Gallagher*, 2 Sandf. (N. Y.) 402.

§ 5. **Upon what judgments.** It is a final judgment only, that will support an action, an interlocutory judgment will not do so. *Ledyard* v. *Brown*, 39 Tex. 402; S. C., 28 id. 393; *Dimick* v. *Brooks*, 21 Vt. 569. Thus a judgment of foreclosure, directing the sale of the property and the payment of any deficiency by the defendant, is not a final judgment upon which an action can be maintained against the defendant for the deficiency, until a judgment has been docketed against the de-

fendant. *Hanover Fire Ins. Co.* v. *Tomlinson*, 3 Hun (N. Y.), 630. So, an action cannot be maintained upon a judgment of a foreign court, in replevin, for the return of goods or the recovery of their value. *Thorner* v. *Batory*, 41 Md. 593.

Judgments are either foreign or domestic, and are rendered either by courts of general and superior jurisdiction, or by courts of limited and inferior jurisdiction. They are also distinguished as being *in rem*, or *in personam*. These distinctions must be borne in mind in considering the right of action.

§ 6. **Judgments in rem.** Several definitions of judgments *in rem* have been attempted, none of which are satisfactory. Freeman on Judgments, § 606. For the present purpose it is enough to state the legal effect of such a judgment and the conditions upon which i is based. These are well expressed by Mr. Justice Blackburn in the case of *Castrique* v. *Imrie*, L. R., 4 H. of L. 414, 429. He says: "We think the inquiry is whether the subject-matter was so situated as to be within the lawful control of the State under the authority of which the court sits; and secondly, whether the sovereign authority of that State has conferred on the court jurisdiction to decide as to the disposition of the thing, and the court has acted within its jurisdiction. If these considerations are fulfilled the adjudication is conclusive against all the world." Story's Confl. of Laws, § 618 *e.*; *Grignon's Lessee* v. *Astor*, 2 How. (U. S.) 319, 338; *Peters* v. *Warren Ins. Co.*, 3 Sum. (C. C.) 389; S. C., 14 Pet. 99; *Magoun* v. *N. E. Ins. Co.*, 1 Story, 157. Such has always been the rule with respect to proceedings *in rem* in the admiralty. *Magoun* v. *N. E. Ins. Co.*, 1 Story, 157; *Peters* v. *Warren Ins. Co.*, 3 Sum. (C. C.) 389; S. C., 14 Pet. 99; *Grant* v. *McLachlin*, 4 Johns. 34; *The Mary*, 9 Cranch, 126; *Hudson* v. *Guestier*, 4 id. 293; *Williams* v. *Armroyd*, 7 id. 423; *Whitney* v. *Walsh*, 1 Cush. 29. A judgment *in rem*, however, while it binds the property against all the world, does not, if the defendant does not appear and defend the suit, go further, and it cannot be made the basis of an action, even in the State where it is rendered, to obtain satisfaction out of other property. *Eastman* v. *Wadleigh*, 65 Me. 251; 20 Am. Rep. 695; *Easterly* v. *Goodwin*, 35 Conn. 273. Nor will it support a personal action against a defendant in a foreign court. *Arndt* v. *Arndt*, 15 Ohio, 33; *Mc Vicker* v. *Beedy*, 31 Me. 316. This is happily illustrated by Sandford, V. Chan., in *Monroe* v. *Douglas*, 4 Sandf. Ch. (N. Y.) 134, 182. He says: "It is to be borne in mind, that the effect of a judgment *in rem*, is wholly distinct from its effect against the person of the defendant. It may be entirely conclusive as to the former, and yet be inefficacious for any purpose, *in personam*, either in a foreign tribu-

nal, or in the country where it is recovered. Thus, in the every day's occurrence, of the foreclosure of mortgages in this court, against a mortgagor who is personally liable for the debt, and by reason of his absence from the State, is not served with process. The decree is made on the publication of notice, and in respect of the mortgaged premises, is binding and conclusive. So far, it is *in rem*. But if in the same decree, the mortgagee should insert a clause that the mortgagor must pay the deficiency of the debt, if any there should be, after a sale, and awarding execution against him therefor; such clause would be purely, *in personam*, and of no avail or force, even in the court where the decree was entered."

Another familiar illustration of the rule just stated is found in proceedings by attachment against non-resident debtors. Judgments rendered in such actions, without personal service of the defendant within the jurisdiction of the court, will not sustain an action. *Bissell* v. *Briggs*, 9 Mass. 468; *Arndt* v. *Arndt*, 15 Ohio, 33; *Robinson* v. *Ward*, 8 Johns. 86; *Kilburn* v. *Woodworth*, 5 id. 41; *Bates* v. *Delevan*, 5 Paige, 299; *Thompson* v. *Emmert*, 4 McL. 96; *Melhop* v. *Doane*, 31 Iowa, 397; 7 Am. Rep. 147; *Ward* v. *McKenzie*, 33 Tex. 297; 7 Am. Rep. 261; *Sevier* v. *Roddie*, 51 Mo. 580; Freeman on Judgments, § 573; *Miller* v. *Dungan*, 36 N. J. Law, 21; *McDermott* v. *Clary*, 107 Mass. 501.

§ 7. **Foreign judgments.** "It is not an admitted principle of the law of nations," says Blackburn, J., in *Godard* v. *Gray*, L. R., 6 Q. B. 139, 148, "that a State is bound to enforce within its territories the judgment of a foreign tribunal. Several of the continental nations (including France) do not enforce the judgments of other countries unless when there are reciprocal treaties to that effect. But in England and in those states which are governed by the common law, such judgments are enforced, not by virtue of any treaty, not by virtue of any statute, but upon a principle very well stated by Parke, B., in *Williams* v. *Jones*, 13 M. & W. 633: 'Where a court of competent jurisdiction has adjudicated a certain sum to be due from one person to another, a legal obligation arises to pay that sum on which an action of debt to enforce the judgment may be maintained. It is in this way that judgments of foreign and colonial courts are supported and enforced.' And taking this as the principle it seems that any thing which negatives the existence of that legal obligation or excuses the defendant from the performance of it, must form a good defense to the action."

It may, consequently, be shown that the court which rendered the judgment was without jurisdiction, either of the subject-matter, or of the person against whom the judgment was pronounced. *Bischoff*

v. *Wethered*, 9 Wall. 812; *Schibsby* v. *Westenholz*, L. R., 6 Q. B. 155; Story on Confl. of Laws, § 547; *Kerr* v. *Kerr*, 41 N. Y. (2 Hand) 272; *Mowry* v. *Chase*, 100 Mass. 79; *Folger* v. *Columbian Ins. Co.*, 99 Mass. 266; *Carleton* v. *Bickford*, 13 Gray, 591; *Hickey* v. *Stewart*, 3 How. (U.S.) 762; *Borden* v. *Fitch*, 15 Johns. 121; *Duchess of Kingston's Case*, 2 Smith's L. Cas. 599; 2 Pars. on Cont. 609.

And when the defendant is served not personally, but by an artificial mode, and is not a subject of nor resident in the country in which the judgment is given, either at the time of contracting the obligation, or at the commencement of the suit, the judgment will not be enforced, for that would be to permit the foreign country to legislate for the whole world. *Schibsby* v. *Westenholz*, L. R., 6 Q. B. 155, 160, 161. See *General Steam Nav. Co.* v. *Guillou*, 11 M. & W. 877, 894; *Copin* v. *Adamson*, L. R., 1 Exch. Div. 17; 15 Eng. Rep. 267; *Buchanan* v. *Rucker*, 9 East, 192, 194; Story on Confl. of Laws, § 547.

So, likewise, a foreign judgment may be impeached if it is shown to have been obtained by fraud. *Reimers* v. *Druce*, 23 Beav. 145; *Lazier* v. *Westcott*, 26 N. Y. (12 Smith) 146; *Henderson* v. *Henderson* 6 Q. B. 288; *Rankin* v. *Goddard*, 54 Me. 28, and 53 id. 389; *Wood* v. *Watkinson*, 17 Conn. 500; *Welch* v. *Sykes*, 3 Gil. 197; *Rogers* v. *Gwinn*, 21 Iowa, 59; *Dunlap* v. *Cady*, 31 id. 260; 7 Am. Rep. 129, and note. And it is said by PHILLIMORE, J., in *Messina* v. *Petrococchino*, L. R., 4 P. C. 144, 159, that a foreign judgment of a competent court may be impeached if it carries on the face of it a manifest error; if it is shown to have been obtained by fraud, or to be wanting in the conditions of natural justice; and it cannot be applied to persons others than those who were parties to the litigation decided by it, except in cases where the judgment is *in rem*.

How far a mistake of law or fact, unless shown to be intentional on the part of the tribunal giving the judgment, can be set up to invalidate the judgment has been a question greatly mooted. The tendency of the later English and American cases seems to be to regard foreign judgments quite as conclusive as domestic judgments. A foreign judgment cannot, therefore, be impeached on the ground that it is erroneous on the merits. *Rankin* v. *Goddard*, 55 Me. 389; *Konitzky* v. *Meyer*, 49 N. Y. (4 Sick.) 571; *Low* v. *Mussey*, 41 Vt. 393; *Silver Lake Bank* v. *Harding*, 5 Ham. (Ohio) 545. And see note to *Andrews* v. *Herriot*, 4 Cow. 508; Freeman on Judgm., § 597; *Bank of Australasia* v. *Nias*, 16 Q. B. 717; *Bank of Australasia* v. *Harding*, 9 C. B. 661; *Vanquelin* v. *Bouard*, 15 C. B. (N. S.) 341; *De Cosse Brissac* v. *Rathbone*, 6 H. & N. 301. Nor by reason of a mistake of

law. *Godard* v. *Gray*, L. R., 6 Q. B. 139; *Castigue* v. *Imrie*, L. R., 4 H. L. 414.

But where it was admitted that the law of the foreign tribunal had not been correctly declared by its judgment, it was not regarded as binding upon an English court. *Meyer* v. *Ralli*, L. R., 1 C. P. Div. 358.

The doctrine as to the conclusiveness of a foreign judgment upon the merits as suggested above has not always been here tried with distinctness. Indeed, it has been declared by eminent authority that when the action is directly on a foreign judgment or decree it is no more than *prima facie* evidence. Story on Confl. of Laws, § 607; *Andrews* v. *Herriot*, 4 Cow. 508, and note, p. 523.

Although the rule is otherwise where a judgment obtained in a foreign tribunal is set up as a defense to an action upon the same cause of action (Story on Confl. of Laws, § 598; *Phillips* v. *Hunter*, 2 H. Bl. 402; *Mills* v. *Duryee*, 2 Am. L. Cas. 597, 612); or, as the rule is sometimes stated, a foreign judgment is conclusive as a defense, but only affords a presumption when made the foundation of a suit. *Monroe* v. *Douglass*, 4 Sandf. Ch. 126, 181; *Mills* v. *Duryee*, 2 Am. L. Cas. 597.

The tendency of modern authorities is, as we have seen, to regard a foreign judgment as equally conclusive when used either as a defense, or affirmatively as a cause of action.

But since real estate is subject exclusively to the laws of the State in which it is located, a decree or judgment of a foreign State touching real property is void in the State where the property is situated. It is true that a foreign court may decree the performance of contracts relating to land without their jurisdiction (*Penn* v. *Lord Baltimore*, 2 Lead. Cas. in Eq. 1806, and cases cited; *Deklyn* v. *Watkins*, 3 Sandf. Ch. 185); but such a decree can only be enforced against the person of the defendant in the foreign court of the State where the property is situated. *Davis* v. *Headly*, 22 N. J. Eq. 115.

§ 8. **Judgments of courts of sister States.** Aside from the constitution of the United States, the judgments of other States of the Union have no higher force or validity than foreign judgments. *Seevers* v. *Clements*, 28 Md. 426; *Folger* v. *Columbian Ins. Co.*, 99 Mass. 267.

Article 4, section 1 of the Constitution of the United States declares that "full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State; and the congress may, by general laws, prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof."

In pursuance of this authority, congress, on the 24th of May, 1790 (1 R. S. [U. S.], § 905), enacted as follows:

"The records and judicial proceedings of the courts of any State or Territory, or of any such country, shall be proved and admitted in any other court within the United States by the attestation of the clerk and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice or presiding magistrate, that the said attestation is in due form. And the said records and judicial proceedings so authenticated shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken."

A wide diversity of opinion has arisen in the construction of this constitutional provision, and of the statute. On the one hand it has been claimed that the act of congress only provided for the admission of such records as evidence, but inasmuch as a judgment rendered in a court not having competent jurisdiction is a nullity, it is always competent to inquire into the jurisdiction of the court in which the judgment offered in evidence was rendered, and for the purpose of such inquiry to contradict the record; and that such want of jurisdiction may be shown either as to the subject-matter, or the person, or in proceedings *in rem* as to the thing. *Pennywit* v. *Foote*, 27 Ohio St. 600; *Folger* v. *Columbian Ins. Co.*, 99 Mass. 467; *Hoffman* v. *Hoffman*, 46 N. Y. (1 Sick.) 40; 7 Am. Rep. 299; *Bissel* v. *Briggs*, 9 Mass. 462; *Christmas* v. *Russell*, 5 Wall. 290; *Harris* v. *Hardeman*, 14 How. (U. S.) 334; *United States* v. *Arredondo*, 6 Pet. 691; *Voorhees* v. *Bank of United States*, 10 id. 475; *Mackay* v. *Gordon*, 34 N. J. 286; Story on Const., § 1307; Story on Confl. of Laws, § 609; *Paine's Lessees* v. *Mooreland*, 15 Ohio, 445; *Marx* v. *Forde*, 51 Mo. 69; S. C., 11 Am. Rep. 432.

On the contrary, it has been held that the act declared that the record duly authenticated shall have such faith and credit as it had in the State from whence it was taken; and therefore, if in that State it had faith and credit of evidence of the highest nature, viz., record evidence unimpeachable, it should have the same in every other State, and that therefore, where the record disclosed the jurisdictional facts, it could not be controverted in the tribunals of another State. *Zepp* v. *Hager*, 70 Ill. 223; *Craft's Adm'rs* v. *Clark*, 31 Iowa, 77; *Faber* v. *Hovey*, 117 Mass. 107; 19 Am. Rep. 398; *Carleton* v. *Bickford* 13 Gray, 591; *Thompson* v. *Whitman*, 18 Wall. 457; *Mills* v. *Duryee*, 7 Cranch, 484; 2 Am. Lead. Cas. 597; Freeman on Judgments, § 561; *Westcott* v. *Brown*, 13 Ind. 83; *Hall* v. *Williams*, 6 Pick. 232; *Shumway* v. *Stillman*, 6 Wend. 447.

§ 9. **Superior and inferior courts.** The distinction between the proceedings of superior and inferior courts is clearly stated by FIELD, J., in *Galpin* v. *Page*, 18 Wall. 350, 365. "A superior court of general jurisdiction proceeding within the general scope of its powers, is presumed to act rightly. All intendments of law, in such cases, are in favor of its acts. It is presumed to have jurisdiction to give the judgments it renders until the contrary appears. And this presumption embraces jurisdiction not only of the cause or subject-matter of the action in which the judgment is given, but of the parties also. The rule is different with respect to courts of special and limited authority; as to them there is no presumption of law in favor of their jurisdiction; that must affirmatively appear by sufficient evidence, or proper averments in the record, or their judgments will be deemed void on their face." *Shufeldt* v. *Buckley*, 45 Ill. 223; *Mills* v. *Martin*, 19 Johns. 34; *Ford* v. *Babcock*, 1 Denio, 158; *Sears* v. *Terry*, 26 Conn. 273; *Ohio & M. R. R. Co.* v. *Shultz*, 31 Ind. 150; *Thompson* v. *Multnomah Co.*, 2 Oreg. 34; *Crepps* v. *Durden*, 1 Smith's L. Cas. 816, 819. The jurisdictional facts may be shown *aliunde* the record. *Van Deusen* v. *Sweet*, 51 N. Y. (6 Sick.) 378; *Jolley* v. *Foltz*, 34 Cal. 321.

And the record of proceedings may be contradicted by any competent proof that the court did not have jurisdiction either of the person or of the subject-matter. *Rowley* v. *Howard*, 23 Cal. 401; *Pardon* v. *Dwire*, 23 Ill. 574; *First Nat. Bank* v. *Balcom*, 35 Conn. 351.

When, however, the question of jurisdiction has been determined, the judgment of an inferior tribunal is as conclusive upon the merits as a judgment of a court of general jurisdiction. *Reid* v. *Spoon*, 66 N. C. 415; *Shoemaker* v. *Brown*, 10 Kans. 383; *Bernal* v. *Lynch*, 36 Cal. 135; *Sheldon* v. *Wright*, 5 N. Y. (1 Seld.) 497.

§ 10. **Action, when to be brought.** In general, actions on judgments are not limited by the statute of limitations. *Dudley* v. *Lindsey*, 9 B. Monr. (Ky.) 488; *Mitchell* v. *Mitchell*, 8 Humph. (Tenn.) 359; *Todd* v. *Crumb*, 5 McL. 172; *Pease* v. *Howard*, 14 Johns. 479. But in most if not all of the States, the statute has been extended to judgments. Angel on Lim., § 83, *et seq.* Thus, in New York, a judgment rendered in a court of record of the United States, or elsewhere, is presumed to be paid and satisfied after the expiration of twenty years from the time when the party recovering it was first entitled to a mandate to enforce it. Code, § 376. The general rule that judgments are not within the statute seems to be confined to judgments of courts of record. Hence a judgment of a justice of the peace is within the statute. *Lester* v. *Redmond*, 6 Hill, 590; *Bannegan* v. *Murphy*, 13 Metc. 251; *Woodman* v. *Somerset*, 37 Me. 29; *Burd* v. *McGregor*,

2 Grant (Penn.), 353. So, also, foreign judgments have been held to be within the statute on the theory that they are but *prima facie* evidence of debt, of no higher nature than a simple contract. *Pease* v. *Howard*, 14 Johns. 479; *Walker* v. *Witter*, Doug. 1; *Harris* v. *Saunders*, 4 Barn. & Cres. 411.

Judgments of sister States have also been held to be within the statute, but in some cases the statute of the State where the judgment was rendered was held to govern (*Hubbell* v. *Coudrey*, 5 Johns. 132; S. P., *Bissell* v. *Hall*, 11 Johns. 168), while in others, the statute of the State where the action on the judgment is brought has been applied. *McElmoyle* v. *Cohen*, 13 Peters (U. S.), 312; *Brown* v. *Parker*, 28 Wis. 21.

§ 11. **Recovery, nature and amount.** At common law a judgment does not carry interest. *Thompson* v. *Morrow*, 2 Cal. 99. Hence, in an action on a judgment of a sister State, the common law will be presumed to prevail, and no interest will be allowed. *Thompson* v. *Morrow*, 2 Cal. 99. But in some of the States interest is allowed. *Johnson* v. *Tuttle*, 17 Abb. Pr. (N. Y.) 315; *Harrington* v. *Glenn*, 1 Hill (S. C.), 79.

How far a recovery in trespass or trover operates as a transfer of title to chattels is not a settled point. *Lovejoy* v. *Murray*, 3 Wall. (U. S.) 1, 14, 15.

§ 12. **Defenses.** The presumptions are in favor of the validity of a judgment of a court of general jurisdiction. *Reber* v. *Wright*, 68 Penn. St. 471; *Read* v. *The City of Buffalo*, 4 Abb. Ct. App. (N. Y.) 22; S. C., 3 Keyes, 447; *Drake* v. *Duvenick*, 45 Cal. 455. When the record is silent as to what was done, it will be presumed that what ought to have been done was not only done, but rightly done. But when the record states what was done, it will not be presumed that something different was done. *Hahn* v. *Kelly*, 34 Cal. 407.

The plea of *nul tiel record* puts in issue the existence of the judgment (*Stevens* v. *Fisher*, 30 Vt. 200), and puts the plaintiff to the proof of a full record of judgment. *Wright* v. *Fletcher*, 12 Vt. 431; *Fitch* v. *Porter*, 8 Ired. (N. C.) L. 511. This plea raises an issue to be tried by a jury. *Bischoff* v. *Wethered*, 9 Wall. 812. *Nil debet* is an answer to an action on a judgment. *Indianapolis, B. & W. R. R. Co.* v. *Risley*, 50 Ind. 60.

Payment may always be pleaded to a judgment. *Gulick* v *Loder*, 13 N. J. Law, 68; *Cameron* v. *Fowler*, 5 Hill, 306. But *nul tiel record* and payment cannot both be pleaded. *Riley* v. *Riley*, 20 N. J. Law, 114.

A defense which might have been made in the original suit is not

available in an action on the judgment. *Noble* v. *Merrill*, 48 Me. 140; *Guinard* v. *Heysinger*, 15 Ill. 288; *Ellis* v. *Clarke*, 19 Ark. 420; *Flint* v. *Sheldon*, 13 Mass. 443; *Taylor* v. *Harris*, 21 Tex. 438; *Morris* v. *Boomer*, 16 Wis. 547. So a party cannot set up as a defense to a judgment, matters on which he had based a petition therein which had been decided against him. *Poorman* v. *Mitchell*, 48 Mo. 45. On a similar principle, the consideration of the judgment cannot be inquired into. *Brown* v. *Trulock*, 4 Blackf. (Ind.) 429; *Cottle* v. *Cole*, 20 Iowa, 481.

So it has been held that proof of the payment of part of a claim prior to the entry of judgment was not available in an action on the judgment. *Bird* v. *Smith*, 34 Me. 63. But evidence of payments made after suit brought which the judgment creditor promised to apply in satisfaction, was deemed proper in *Cameron* v. *Fowler*, 5 Hill, 306; and when, as under the Code, law and equity are administered by the same tribunal, a state of facts which would entitle a judgment debtor to maintain an action in equity to set aside the judgment may be pleaded in an action on the judgment. *Dobson* v. *Pearce*, 12 N. Y. (2 Kern.) 156.

A judgment may be impeached for fraud. *Rogers* v. *Rogers*, 15 B. Monr. (Ky.) 364; *Whetstone* v. *Whetstone*, 31 Iowa, 276; *Cowin* v. *Toole*, id. 513; *Amory* v. *Amroy*, 3 Biss. (C. C.) 266; *Davis* v. *Davis*, 61 Me. 395; *Coffee* v. *Neely*, 2 Heisk. (Tenn.) 304; *Ward* v. *Quinlivin*, 57 Mo. 425; *Dobson* v. *Pearce*, 12 N. Y. (2 Kern.) 156.

So, a judgment rendered by a court not having jurisdiction of the parties, and of the subject-matter is void. *Dorsey* v. *Kendall*, 8 Bush (Ky.), 294; *Starbuck* v. *Murray*, 5 Wend. 148; *Sears* v. *Terry*, 26 Conn. 273. A judgment pronounced by a tribunal having no authority to determine the matter in issue, is necessarily and incurably void and may be shown to be so in any collateral or other proceedings in which it is drawn in question. *Gilliland* v. *Sellers' Adm'r*, 2 Ohio St. 223; *Morse* v. *Presby*, 5 Foster, 299; *Eaton* v. *Badger*, 33 N. H. 228; *King* v. *Poole*, 36 Barb. 242; *Blair* v. *Cummings*, 39 Cal. 667; *Williamson* v. *Berry*, 8 How. (U. S.) 492. See *Crepp* v. *Durden*, 1 Smith's L. Cas. 824. But if the judgment be one of a court of superior jurisdiction, all the jurisdictional facts will be presumed in its favor. *Potter* v. *Merchants' Bank*, 28 N. Y. (1 Tiff.) 656; *Wells* v. *Waterhouse*, 22 Me. 131; *Withers* v. *Patterson*, 27 Tex. 491; *Reynolds* v. *Stansbery*, 20 Ohio, 344; Freeman on Judgments, § 124; *ante*, 188, § 6. But this presumption extends only to those matters in reference to which the record is silent. If facts are stated from which a want of

jurisdiction can be shown, the judgment is void. *Clark* v. *Thompson*, 47 Ill. 25; *Hahn* v. *Kelly*, 34 Cal. 391.

Jurisdiction of the party defendant can be acquired only by notice to him, or by his consent and voluntary appearance, and when there has been no valid notice or appearance, the judgment is a nullity. *Nelson* v. *Rockwell*, 14 Ill. 375; *Wingate* v. *Haywood*, 40 N. H. 437; *Harris* v. *Hardeman*, 14 How. 334. If the record recites an appearance by attorney, this recital is conclusive in a proceeding upon the judgment. *Brown* v. *Nichols*, 42 N. Y. (3 Hand) 26; *Hamilton* v. *Wright*, 37 N. Y. (10 Tiff.) 502; *Carpentier* v. *Oakland*, 30 Cal. 439. See *Dunlap* v. *Cody*, 31 Iowa, 260; 7 Am. Rep. 129; *contra*, *Bodurtha* v. *Goodrich*, 3 Gray, 508.

Whether, when the record of a court of general jurisdiction recites matters showing that the court had jurisdiction of the parties and the subject, these recitals can be contradicted by extrinsic evidence, is a question upon which the decisions remain in conflict.

In the following cases it has been held that the record imports absolute verity and cannot be contradicted by extrinsic evidence (*Westcott* v. *Brown*, 13 Ind. 83; *Hall* v. *Williams*, 6 Pick. 232; *Zepp* v. *Hager*, 70 Ill. 223; *Farr* v. *Ladd*, 37 Vt. 156; *Eastman* v. *Waterman*, 26 id. 494; *Aultman* v. *McLean*, 27 Iowa, 129; *Penobscott R. R. Co.* v. *Weeks*, 52 Me. 456; *Hotchkiss* v. *Cutting*, 14 Minn. 537); but in the following cases a contrary opinion has prevailed. *Edwards* v. *Toomer*, 14 S. & M. 75; *Smith* v. *The State*, 13 id. 140; *Goudy* v. *Hall*, 30 Ill. 109; *Webster* v. *Reid*, 11 How. (U. S.) 437; *Baldwin* v. *Kimmel*, 16 Abb. Pr. (N. Y.) 353; *Newcomb* v. *Dewey*, 27 Iowa, 381; *Pennywit* v. *Foote*, 27 Ohio St. 600; *Christmas* v. *Russell*, 5 Wall. 290; *Hoffman* v. *Hoffman*, 46 N. Y. (1 Sick.) 30; 7 Am. Rep. 299.

A judgment rendered by a judge who is disqualified by consanguinity is utterly void. *Chambers* v. *Clearwater*, 1 Abb. Ct. App. 341; 1 Keyes, 310.

Every judgment against a married woman, which does not show upon its face her liability, is a void judgment. *Swayne* v. *Lyon*, 67 Penn. St. 439; *Morse* v. *Toppan*, 3 Gray, 411; *Griffith* v. *Clarke*, 18 Md. 457; *Higgins* v. *Peltzer*, 49 Mo. 152. This is on the ground that a judgment creates a debt and can therefore be taken only against one capable of contracting a debt. *Morse* v. *Toppan*, 3 Gray, 411. But the plea of infancy is a personal plea, which may be waived, and a judgment against an infant is not, therefore, void. *Smith* v. *McDonald*, 42 Cal. 484; Freeman on Judgments, § 151.

As to lunatics, however, the rule is that judgments taken against

them are neither void nor voidable. *Norton* v. *Harding*, 3 Oreg. 361; *Wood* v. *Bayard*, 63 Penn. St. 320; *Foster* v. *Jones*, 23 Ga. 168.

ARTICLE II.

OF ACTIONS UPON DECREES.

Section 1. In general. Some doubt has been expressed as to whether an action at law will lie upon the decree of a court of equity. *Hugh* v. *Higgs*, 8 Wheat. (U. S.) 697; *Stover* v. *Hinkley*, cited in *Post* v. *Neafie*, 3 Cai. 37, *n*. But it seems to be now well settled, that in every instance in which an action of debt can be maintained upon a judgment at law for a sum of money awarded by such judgment, the like action can be maintained upon a decree in equity which is for an ascertained and specific amount, and nothing more. *Pennington* v. *Gibson*, 16 How. (U. S.) 65, 77; *Chandler* v. *Warren*, 30 Vt. 510; *Ames* v. *Hoy*, 12 Cal. 11; *Sadler* v. *Robins*, 1 Camp. 253; *Warren* v. *McCarthy*, 25 Ill. 95; *Post* v. *Neafie*, 3 Cai. 22; *Dubois* v. *Dubois*, 6 Cow. 496.

So an action at law can be maintained upon a decree of a court of admiralty, awarding a specified sum as salvage (*Brown* v. *Bridge*, 106 Mass. 563); but it must appear from the decree that it was the intention of the court to render a personal judgment. *Seligman* v. *Kalkman*, 17 Cal. 152.

A bill in equity may be brought to carry a former decree into execution. This happens generally in cases where parties having neglected to proceed upon the decree, their rights under it become so embarrassed by a variety of subsequent events that it is necessary to have the decree of the court to settle and ascertain them (Story's Eq. Pl., § 429; *Linton* v. *Potts*, 5 Blackf. [Ind.] 396, 399); but the principles governing such cases do not seem to be distinctly defined.

CHAPTER LXXXVIII.

LANDLORD AND TENANT.

ARTICLE I.

TENANCY, HOW CREATED.

Section 1. In general. It will be difficult to do justice to the subject of this chapter, without repeating to some extent what has been said in treating of the action of ejectment as between landlord and tenant, yet an effort will be made to avoid such repetition.

Tenancy is a holding or a mode of holding an estate. Modern usage limits the application of the term to a holding of real property by one party, in subordination to another, who has or claims a superior right. The person having or holding the temporary possession of the estate is called the tenant; the person under whom he holds, the landlord.

The terms "real property" include not only lands, or corporeal hereditaments, but commons, ways, fisheries, franchises, estovers, annuities, rent charges, and all other incorporeal hereditaments; any or all of which may be the subject of a lease.

In order to create the relation of landlord and tenant nothing is essential except a contract, express or implied, between the parties, for the possession of such property, and the reservation to the landlord of some reversionary interest therein. The consideration is usually a stated rent, but mere favor, or something paid at the inception of a tenancy, is sufficient to sustain it. See *Hunt* v. *Comstock*, 15 Wend. 665; *Osborne* v. *Humphrey*, 7 Conn. 335.

§ 2. **Tenancy by implication.** The law will, in general, imply a tenancy, whenever one party occupies land by permission of another who owns or has a superior right to it. Thus an occupation pending the execution of a lease; or under a conditional agreement for a purchase if title can be made; or under a proposition to either lease or purchase on specific terms, not followed by notice of election to purchase, constitutes the occupier a tenant. *Hamerton* v. *Stead*, 5 D. & R. 206; 3 B. & C. 478; *Doe d. Newby* v. *Jackson*, 2 D. & R. 514; 1 B. & C. 448; *Hartwell* v. *Black*, 48 Ill. 301; *Harris* v. *Frink*, 49 N. Y.

(4 Sick.) 24; 10 Am. Rep. 318; *Wright* v. *Roberts*, 52 Wis. 161. A person who enters upon land tortiously, but afterward consents to hold under the owner, becomes a tenant; but the assent of the landlord alone is not sufficient to make him a tenant. *Ackerman* v. *Lyman*, 20 Wis. 454.

The failure of one who enters and occupies under a contract of purchase, to pay the purchase-money, will not entitle the vendor to rescind that contract, and treat the purchaser as a tenant. *Tucker* v. *Adams*, 52 Ala. 254; *Watkins* v. *Holman*, 16 Pet. 25.

As between tenants in common, no tenancy will ordinarily be implied from the mere occupancy of the common property by one, to the exclusion of the other, without contract. *Bird* v. *Earle*, 15 Fla. 447; *Kline* v. *Jacobs*, 68 Penn. St. 57. But, *it seems*, a tenancy may be implied where one of three persons named as grantees in a deed of land pays no part of the purchase-money, and neither claims title nor exercises control over the property for years, but leaves the others in possession. *Webster* v. *Holland*, 58 Me. 168. And if partners occupy premises belonging to two of their number as tenants in common and pay rent, this will create the relation of landlord and tenant. *Chapin* v. *Foss*, 75 Ill. 280.

Payment and receipt of money as rent are themselves circumstances from which a tenancy may be implied, even where such payment is under an invalid agreement. *Knight* v. *Bennett*, 3 Bing. 361; 11 Moore, 227; *Morris* v. *Niles*, 12 Abb. Pr. 103. A tenancy may also be implied from a variety of other circumstances, such as the taking of the key of a dwelling for the purpose of occupying it (*Little* v. *Martin*, 3 Wend. 219); attorning to an infant, although he does not assent to it (*Doe d. Miller* v. *Noden*, 2 Esp. 530); acknowledging possession and agreeing to pay rent (*Goodman* v. *Jones*, 26 Conn. 264); allowing a vendor to occupy premises until the payment of a mortgage (*Hunt* v. *Comstock*, 15 Wend. 665); or entering under an agreement to accept a lease and afterward refusing it. *Anderson* v. *Prindle*, 23 Wend. 619.

One who takes or occupies under a tenant with notice when the term will end is liable as a tenant to the original lessor. *Schilling* v. *Holmes*, 23 Cal. 227; *Coit* v. *Palmer*, 7 Robt. 413; S. C., 4 Abb. (N. S.) 140; S. C. affirmed, 51 N. Y. (6 Sick.) 647. Otherwise as to one who merely occupies jointly with him alone. *Carver* v. *Palmer*, 33 Mich. 342.

Mere occupation of premises without the privity or consent of the owner, or without any recognition of the rights of the landlord, does not create any tenancy. *Doe d. Rogers* v. *Pullen*, 2 Bing. N. C. 749; *Doe d. Bingham* v. *Cartwright*, 3 B. & Ald. 326; *Benjamin* v. *Benjamin*, 5 N. Y. (1 Seld.) 388; *Hall* v. *Jacob*, 7 Bush (Ky.), 595.

A permitted occupation of premises by a servant of the owner for the more convenient performance of his duties, even though it continues for a temporary purpose after his term of service, or a sum is deducted from his wages on account of it, gives no estate. *White* v. *Bayley*, 10 C. B. (N. S.) 227; *Kerrains* v. *People*, 60 N. Y. (15 Sick.) 221; S. C., 19 Am. Rep. 158; *Hunt* v. *Colson*, 3 Moore & S. 790; *McQuade* v. *Emmons*, 38 N. J. Law, 397.

Nor will participation in the profits of land, not occupied to the exclusion of the owner, amount to a tenancy. *Johnson* v. *Carter*, 16 Mass. 443; *Walker* v. *Fitts*, 24 Pick. 191.

The effect of a tenant's holding over will be considered hereafter.

§ 3. **Tenancy by express agreement.** A contract creating a tenancy is technically called a *lease* or *demise*. It may be made and proved either by word of mouth or by writing; and, if in writing, it may be either a mere memorandum, a letter or series of letters, or a formal instrument with or without a seal. The form or phraseology of a lease is not material to its validity or effect, provided it clearly shows the intention of the one party to put the other in possession of the premises, and of the latter to assume such possession for some determinate period.

A lease may be distinguished from a mere agreement for a lease, by its purporting to convey to the tenant a present right of possession, without contemplating the execution of any further instrument for the purpose. The legal effect of the two instruments distinguishes them still more widely. The former, upon its execution, confers on the tenant an interest in the land, and the term becomes vested in him immediately upon his entry. The latter confers no present legal interest in the premises, yet it will operate as a license to enter thereon, and then if the intended landlord refuses to execute the lease the proposed tenant can enforce a specific performance, or recover his damages. *Price* v. *Williams*, 1 M. & W. 6.

The use of the word "agreement" is not decisive of the character of the instrument, nor will words of present demise make it a lease, if a contrary intention can be clearly inferred from the rest of the paper. *John* v. *Jenkins*, 1 C. & N. 233; 3 Tyr. 170; *Weed* v. *Crocker*, 13 Gray, 219; *Tempest* v. *Rawling*, 13 East, 18; *Fenner* v. *Hepburn*, 2 Y. & C. 159. The intention of the parties is to be sought from the whole instrument, and that must govern its construction. *Poole* v. *Bentley*, 12 East, 168; *Doe d. Morgan* v. *Powell*, 8 Scott, N. R. 687; 7 M. & G. 980; 8 Jur. 1123; *Morgan d. Dowding* v. *Bissell*, 3 Taunt. 65; *People* v. *Gillis*, 24 Wend. 201.

Certainty, as to time of commencement, duration and amount of

rent, is usually necessary to constitute a present demise. *Wright* v. *Trevezant*, 3 C. & P. 441; 8 Bing. 178; 6 B. & A. 322.

A letting of agricultural lands to be worked and farmed on shares, creates either the relation of landlord and tenant, or that of tenants in common of the crops, according to the terms of the contract and the intentions of the parties. Such a letting for a year, at a stipulated rent, will constitute the former relation, even though the rent is to be paid partly in crops. *Alwood* v. *Ruckman*, 21 Ill. 200. It has been so held, in some cases, where the rent was to be paid by delivery to the landlord of a specified share by measure of the crops raised, the whole of the crops being there recognized as belonging to the tenant until partition. *Walls* v. *Preston*, 25 Cal. 59; *Burns* v. *Cooper*, 31 Penn. St. 426; *Rinehart* v. *Olivine*, 5 Watts & S. 157; *Hoskins* v. *Rhodes*, 1 Gill & J. 266; *Hatchell* v. *Kimbrough*, 4 Jones (N. C.), 163; *Ross* v. *Swaringer*, 9 Ired. 481. On the other hand, the decisions are very numerous that a letting of lands on shares for a single year or for a series of years is no lease, and does not give the farmer any interest in the land; but he and the land-owner are merely tenants in common of the crops. *Bradish* v. *Schenck*, 8 Johns. 151; *Aiken* v. *Smith*, 21 Vt. 181; *Williams* v. *Nolen*, 34 Ala. 167; *Lowe* v. *Miller*, 3 Gratt. 205; *Ferrall* v. *Kent*, 4 Gill, 209; *Guest* v. *Opdike*, 31 N. J. Law, 554; *Bernel* v. *Hovious*, 17 Cal. 546; *Fiquet* v. *Allison*, 12 Mich. 330; *Currey* v. *Davis*, 1 Houst. (Del.) 598; *Williams* v. *Cleaver*, 4 id. 453. Even calling this share of the crops rent, or using the technical terms of a lease, does not change the rule. *Taylor* v. *Bradley*, 39 N. Y. (12 Tiff.) 129; *Chandler* v. *Thurston*, 10 Pick. 205. Nor does an agreement by the land-owner to pay the farmer for one-half the grain produced have that effect. *Tanner* v. *Hills*, 44 Barb. 428; *Wilber* v. *Sisson*, 53 id. 258; S. C. affirmed, 54 N. Y. (9 Sick.) 121. See *Tanner* v. *Hills*, 48 N. Y. (3 Sick.) 662.

A clause in the lease reserving to the tenant the right to gather the crop after the expiration of the term entitles him to free ingress and egress so far as is necessary to gather and remove the crop, but does not authorize him to hold over and exclude the landlord after the time at which he was to surrender. *Stoddard* v. *Waters*, 30 Ark. 156.

ARTICLE II.

KINDS OF TENANCY.

Section 1. Leases for life. An estate for life is one, the duration of which is limited by a life or lives, either of that of the tenant him-

self or that of some other person or persons. The limitation may also be for the joint lives of two or more grantees, either with or without survivorship.

Such an estate may be created by a lease with reservations of rent and covenants, constituting the relation between the parties to it that of landlord and tenant in the ordinary sense. More frequently, however, in this country, at least, estates for life are created by devise or by grant, or by the act of the law, and that relation does not in any other proper sense exist.

A grant to a person, especially for his own life or for the life of another, of course creates such an estate; and so does one which may endure for a life, though liable to be determined by the happening of some event, or by some act of the grantee, such as a grant to a woman so long as she shall remain a widow; or to a man and woman so long as their marriage relations shall continue, or so long as they shall live in a certain house; or to a person so long as he shall maintain certain works, or shall pay a certain annual sum; or until a certain man shall be paid out of the income. *Jackson* v. *Myers*, 3 Johns. 388; *Roseboom* v. *Van Vechten*, 5 Denio, 414; *Hurd* v. *Cushing*, 7 Pick. 169; *Mickie* v. *Lawrence*, 5 Rand. 571; *Folts* v. *Huntley*, 7 Wend. 210. An indefinite grant by a tenant in tail, or one having only a life estate, will be construed as only for the life of the grantor.

A devise of land to the heir of the testator "after the death of B," by implication gives to B a life estate therein.

A life estate may also be created by the reservation in a deed of the use and control of the premises to the grantor during his life. *Webster* v. *Webster*, 33 N. H. 22; *Richardson* v. *York*, 14 Me. 216.

Of life estates created by law, dower is that which is given to a surviving wife in a portion, usually one-third, of the lands owned by her husband during her coverture, to which is added, in some of the American States, a right to retain and occupy the homestead of her deceased husband during her widowhood; and curtesy is that given to a surviving husband in all the lands owned by the wife at her death. The birth of living issue of the marriage is ordinarily, but not in all the States, required as a condition precedent to the vesting of this estate.

§ 2. **Leases for years.** A lease for a term certain, whether it be for one or more years, is termed a lease for years; and as substantially the same principles apply to tenancies for a less period, such as a half or quarter year, a month or a week, if definite and certain, they are usually classed under the same head. *Brown* v. *Bragg*, 22 Ind. 122; *Gould* v. *School District*, 8 Minn. 431. The relation of landlord and tenant created by such a lease attaches to all persons who succeed to

the possession of the premises through or under the first tenant, and they are bound by the lease. *Torrey* v. *Wallis*, 3 Cush. 442.

A tenancy for years may ordinarily be created in the same manner as any other tenancy. If there are any statutory provisions on the subject, they must be complied with. It is essential that the period of such a tenancy be definite and certain, or that it be uncertain only because it may be determined by some event before its natural expiration, or because it is for a particular purpose which serves to mark its duration. *Doe* v. *Dixon*, 9 East, 15; *Thomas* v. *Wright*, 9 Serg. & R. 87; *Batchelder* v. *Dean*, 16 N. H. 268. A lease "for one year and so on from year to year," or "for years," without fixing any number, is one for two years certain. *Denn* v. *Cartright*, 4 East, 29.

A tenancy from year to year will be created by a demise for a definite term, which gives the lessee a right to terminate it by notice, or to continue it for a further period (*Western Trans. Co.* v. *Lansing*, 49 N. Y. [4 Sick.] 499; *Holmes* v. *Day*, 8 Ir. R. C. L. 235); or by one which fixes no definite term, but reserves an annual rent, payable quarterly (*Lesley* v. *Randolph*, 4 Rawle, 123); or by such a demise and occupation under it for a year or more. *Regina* v. *St. Giles*, 33 L. J. M. C. 3; 12 W. R. 125.

In the absence of any special contract therefor, a tenancy from year to year will be inferred from various circumstances showing the intention of the parties, such as the payment of rent each quarter or other aliquot part of a year (*Doe d. Hull* v. *Wood*, 14 M. & W. 682; 9 Jur. 1060); the payment of an annual rent by one who was a tenant at will or sufferance (*Silsby* v. *Allen*, 43 Vt. 172); possession under an agreement for a lease and payment of an annual rent (*Knight* v. *Benett*, 11 Moore, 222; 3 Bing. 361; *Mann* v. *Lovejoy*, R. & M. 355); an occupancy under a parol lease which is void because for a longer period than is allowed by statute (*Schuyler* v. *Leggett*, 2 Cow. 660); or a general occupation, or a holding over after the expiration of the term by permission of the landlord. *Jackson* v. *Salmon*, 4 Wend. 327; *Right* v. *Darby*, 1 Term, 162; *Kelly* v. *Patterrson*, 43 L. J. C. P. 320; 9 L. R. P. C. 681; 10 Eng. Rep. 353; 30 L. T. (N. S.) 842; *Sullivan* v. *Cary*, 17 Cal. 80.

A tenant occupying generally, or holding over by permission of the landlord, is bound to retain the possession for the current year, and will be liable for the year's rent, even though he leaves, unless the landlord accepts a subsequent occupant as his tenant. *Den* v. *McIntosh*, 4 Ired. (N. C.) 291. The landlord's consent to the continuance of the tenancy, in such cases, need not be express, but may be inferred from his receiving or distraining for rent afterward accruing, and

probably even from his silence for a considerable time. *Conway* v. *Starkweather*, 1 Denio, 113; *Rowan* v. *Lytle*, 11 Wend. 616.

If the grantee of an annuity charged on lands distrains on the lessee of his grantor for arrears, and the latter attorns and pays the rent to him, he thereby becomes his tenant from year to year until such arrears are paid. *Doe* v. *Boulter*, 6 A. & E. 675.

A tenancy from year to year is not to be deemed continuous, but as recommencing every year. It is for one year certain, and every subsequent year it is a springing interest, arising upon the first contract and parcel of it. After a new year has commenced, it becomes an entire lease for the year or years past and that just entered upon. *Grandy* v. *Jubber*, 10 Jur. (N. S.) 652; 33 L. J. Q. B. 151; *Wright* v. *Tracy*, 8 Ir. R. C. L. 478.

A lease which provides that the term is for one month only, and will expire on the first day of the following month, creates a tenancy from month to month, and usually no notice is necessary to terminate it. *Gibbons* v. *Dayton*, 4 Hun (N. Y.), 451. A tenancy from quarter to quarter may be created by holding under a void parol agreement, and paying rent quarterly. *Botsford* v. *Darling*, 47 N. Y. (2 Sick.) 666; *Witt* v. *Mayor of N. Y.*, 5 Robt. (N. Y.) 248; S. C., 6 id. 441.

The interest acquired by a tenant for years, or from year to year, is a seizin, not of the freehold, but of a term of years which is a chattel interest. Upon the death of the tenant, his interest usually vests in his personal representatives, and they will hold upon the same terms as he did. *Doe* v. *Porter*, 3 Term R. 13; *Mackay* v. *Mackreth*, 4 Doug. 213; 2 Chit. 461.

§ 3. **Leases at will.** Formerly a tenancy at will was absolutely terminable at the will of the landlord; and a tenancy of that precise character may still be created by express agreement. Thus, a writing in the words "I give you a close to enjoy as long as I please, and to take again when I please," creates such a tenancy (*Rex* v. *Fillongley*, 1 Term R. 458); and a person who is let into possession under an agreement that a lease shall be executed, but in the meantime he shall enjoy the premises on the terms of such lease, becomes immediately a tenant at will (*Anderson* v. *Midland Ry. Co.*, 3 E. & E. 614); at least, he is so after refusing to take the lease. *Dunne* v. *Trustees of Schools*, 39 Ill. 578. A verbal agreement to let a house "so long as the tenant keeps a good school," creates a tenant at will, with a conditional limitation (*Ashley* v. *Warner*, 11 Gray, 43); and a tenancy to continue so long as both parties like, with a reservation of rent for the time occupied, is one at the will of either party. *Richardson* v. *Langridge*, 4 Taunt. 128. And where, by the terms of a written lease,

the tenancy is to continue so long as the parties shall mutually agree, and either party may determine it on four days' notice—rent payable monthly or semi-monthly, as may be most convenient—such renting creates a tenancy at will. *Say* v. *Stoddard*, 27 Ohio St. 478.

In the modern sense, a tenancy at will scarcely differs from a mere permissive occupation. Such a tenancy may be created by an occupation under a lease or deed which is void; or under a verbal agreement for an occupation in common with the landlord. *Huyser* v. *Chase*, 13 Mich. 98; *Ezelle* v. *Parker*, 41 Miss. 520; *Leavitt* v. *Leavitt*, 47 N. H. 329. By statute in Maine, a verbal lease at an annual rent, for any period, creates a tenancy at will. *Withers* v. *Larrabee*, 48 Me. 570. Such a tenancy arises by implication upon any permissive occupation of premises, even without any agreement for rent, or any term prescribed. *Rex* v. *Collett*, R. & R. C. C. 498; *Rex* v. *Jobling*, id. 525; *Sarsfield* v. *Healy*, 50 Barb. 245; *Jones* v. *Shay*, 50 Cal. 508; *Larned* v. *Hudson*, 60 N. Y. (15 Sick.) 102; *Ball* v. *Cullimore*, 2 C. M. & R. 120; 1 Gale, 96; 5 Tyr. 753. For many instances of this kind. see Vol 3, pp. 48, 49.

Although a tenancy at will is not assignable, yet the assignee thereof will become a tenant at will if the landlord claims rent from him and he pays it. *Cunningham* v. *Holton*, 55 Me. 33.

A mere agreement by a tenant to pay rent in advance does not make his tenancy one at will. *Sprague* v. *Quinn*, 108 Mass. 553.

A tenancy at will becomes one from year to year if the tenant pays an annual rent, and, for the purposes of a notice to quit, it is generally deemed such.

§ 4. **Tenancy at sufferance.** A tenant at sufferance is one who has come lawfully into possession of the premises of another by permission of the owner, and continues to occupy, without agreement or consent, after his right has expired, by reason of the mere neglect of his landlord to take measures to expel him. If he comes into the estate by act of law, and not by the act of the party, that relation does not arise, but he may be treated as a mere intruder or trespasser.

Ordinarily, a tenant wrongfully holding over after the determination of his estate, or a vendor so holding after the day on which he was bound to deliver possession to the purchaser or his lessee, who then refuses to give up possession as he had agreed to do in case of sale, is considered a tenant at sufferance. *Wilde* v. *Cantillon*, 1 Johns. Cas. 123; *Hollis* v. *Pool*, 3 Mete. 350; *Hauxhurst* v. *Lobree*, 38 Cal. 563; *Benedict* v. *Morse*, 10 Mete. 223. Other instances of tenancy are the cases of tenants *pur autre vie*, holding after the death of their *cestui que vie*; tenants at will whose estates have been deter-

mined by alienation, by the death of the lessor, or by the happening of some event on which their estate was contingent; under tenants holding over after the expiration of the original tenancy; and mortgagors retaining possession after purchasers on foreclosure are entitled thereto. *Simpkin* v. *Ashurst*, 4 Tyr. 781; *Kinsley* v. *Ames*, 2 Metc. 29.

This species of tenancy immediately changes to one at will or from year to year, whenever the parties agree, the one to hold and the other to permit him to retain possession; and such an agreement may be implied from such circumstances as the payment and receipt of rent for the time held over, or from the length of time such holding is permitted to continue. *Russell* v. *Fabyan*, 34 N. H. 223.

§ 5. **Demise of lodgings.** One or more rooms in a tenement are frequently leased apart from the others, either with or without furniture. As the contract therefor conveys an interest in lands, the statute of fraud applies to it as to other leases and requires it to be in writing in like cases (*Inman* v. *Stamp*, 1 Stark. 12; *Mechelen* v. *Wallace*, 2 N. & P. 224; 7 A. & E. 49); or limits the time for which a verbal agreement will be valid. *Edge* v. *Strafford*, 1 Tyr. 293; 1 C. & J. 391.

A mere contract with a keeper of a hotel or boarding-house for board and lodging does not, however, give the lodger any interest in the realty, or create any tenancy, even though the prices for each are specified separately. *Wilson* v. *Martin*, 1 Denio, 602; *Wright* v. *Stavert*, 2 El. & El. 721; 6 Jur. (N. S.) 867. It is simply an entire contract for board and lodging, and the refusal of the party engaging them to become an inmate of the boarding-house merely renders him liable for a breach of contract. *Wilson* v. *Martin*, 1 Denio, 602.

A tenant of lodgings is entitled to the same privileges as other tenants, and, in general, is subject to the same liabilities. These privileges are not confined exclusively to his own apartments, but he is entitled to the use of the common entrance and stairway leading to them, and of the door-bell, knocker and sky-light connected therewith, and of the water-closet, unless there are stipulations to the contrary. *Underwood* v. *Burrows*, 7 C. & P. 26. If, however, he has an outer door to his apartments, his rights will be more limited, and those apartments will be deemed his distinct mansion, and protected as such. If his access to them is through a common outer door, they are not protected against breaking by an officer who has entered that door to serve mesne process upon him. *Tracy* v. *Talbot*, 6 Mod. 214; 1 Cowp. 1.

A tenant of lodgings is not justifiable in quitting them without

proper notice, even though he may reasonably fear that his goods will be distrained by the superior landlord for rent. *Rickett* v. *Tullick*, 6 C. & P. 66. He will be liable for rent for the time he actually occupies, even though the misconduct of the landlord should justify him in leaving. *Kirkman* v. *Jervis*, 7 D. P. C. 678.

A lodging-house keeper is under no obligation to take care of the goods of the lodger. *Holder* v. *Soulby*, 8 C. B. (N. S.) 254; it is otherwise as to a boarding-house keeper. *Smith* v. *Reed*, 6 Day, 33; 52 How. 14.

ARTICLE III.

DURATION OF TENANCY.

Section 1. In general. The duration of a tenancy depends primarily upon the contract between the parties; and secondarily upon the acts of one or both of them, either done with intent to end the tenancy, or having in law that effect.

The commencement of a tenancy, if not fixed by the lease, may be determined from general principles. A tenancy for life commences upon the delivery of the instrument creating it. It cannot commence *in futuro.* 2 Bl. Com. 314; *Singleton* v. *Bremar*, 4 McCord, 12. To vest this estate, actual delivery of possession was formerly deemed essential, but it is not now generally required in this country.

A term for years need not commence immediately, yet the date of its commencement must be fixed and certain, or it must be capable of being made certain by reference to some event or some contingency that must happen. *Child* v. *Baylie*, Cro. Jac. 459; Taylor's L. & T., § 70. And the intermediate time must be filled by some subsisting estate; a lease to commence after the death of the lessor, or after the death of the life tenant, leaving a possible interval unfilled, not being good. *Neal* v. *Lower*, Pollexf. 55.

A lease which leaves the date of its commencement uncertain, by omission or otherwise, is void, unless that can be determined by other means; but if the date fixed is impossible, *e. g.*, the 30th of February, the lease takes effect from delivery. The time when a tenant commences paying rent at regular intervals is in some cases the commencement of his tenancy (*Doe d. Holcomb* v. *Johnson*, 6 Esp. 10); but that created by acceptance of rent from a tenant holding over, or from his assignee, will be held to commence on the same day of the year as the original lease. *Doe d. Castleton* v. *Samuel*, 5 Esp. 174.

A lease for years, to commence at a future day, or on the happening of some future event, gives the lessee a mere right of possession at the

time fixed, but he is not in complete possession of his term until entry. Yet the obligations of the parties, if not otherwise provided, will commence from the date of the lease, or if that is not dated, from its delivery.

A tenancy under a verbal lease commences from the day when the tenant takes possession under it, without reference to any particular quarter day. *Kemp* v. *Derrett*, 3 Camp. 511.

A perpetual lease may be created by a grant in fee, reserving an annual rent, or by a lease to continue so long as the tenant shall continue to pay the rent and perform the covenants. *Folts* v. *Huntley*, 7 Wend. 210; *Van Rensselaer* v. *Hays*, 19 N. Y. (5 Smith) 68. Unless prohibited by statute such leases are valid, and they can be terminated only by the agreement of the parties or by the enforcement of a forfeiture.

Certainty of continuance is essential to a term for years. This certainty may be attained by limiting the number of years either absolutely, or contingently, upon some event which must happen, and may happen before the expiration of a time specified. *Wright d. Arm* v. *Cartwright*, 1 Burr, 282; 1 Ld. Ken. 529. A term is also certain which may be rendered certain by matter *ex post facto*, as where it is granted for so many years as B shall name.

Statutes sometimes render certain the duration of leases when not otherwise expressly fixed. Such a lease in the city of New York will continue until the next succeeding first of May, and rent will be payable on the usual quarter days if the time for payment is not specified. 1 R. S. 744, § 1; *Taggard* v. *Roosevelt*, 8 How. 141.

Parol leases for long terms are not favored, but their validity is usually limited by statute to terms of one or three years. An occupation under a parol lease given for a longer period than is allowed by statute, or for an unlimited time, and even an occupation without any contract, is construed to be a tenancy from year to year. *Clayton* v. *Blakey*, 8 Term R. 3.

§ 2. **Termination in general.** It is a general rule that a tenancy once shown to exist will be presumed to continue so long as the tenant remains in possession. *Milsap* v. *Stone*, 2 Col. T. 137; *Keane* v. *Cannovan*, 21 Cal. 291.

A tenancy whose duration is fixed and certain by the express terms of the instrument creating it, will terminate without demand or notice on the part of the landlord upon the lapse of the time or the happening of the event by which it is limited; or, to be more definite, in the case of a tenancy for years, upon the last moment of the anniversary of the day from which the tenant was to hold in the last year of his tenancy. *Ackland* v. *Lutley*, 9 A. & E. 879; *Cobb* v. *Stokes*, 8 East,

358; *Jackson* v. *Bradt*, 2 Caines, 169; *Bedford* v. *McElherron*, 2 Serg. & R. 49; *Rich* v. *Keyser*, 54 Penn. St. 86; *Chesley* v. *Welch*, 37 Me. 106.

Thus, a lease for the life of a third person absolutely terminates upon his death (*Seaton* v. *Davis*, 1 N. Y. Sup. [T. & C.] 91; *Livingston* v. *Tanner*, 14 N. Y. [4 Kern.] 64); one for the joint lives of two or more persons will terminate on the death of either of them; and one to a partnership for so long as it shall continue, will terminate on the dissolution thereof. *Doe d. Waithman* v. *Miles*, 1 Stark. 181; 4 Camp. 373. And so the expiration of any other period for which a tenancy is created will terminate it, even though it is fixed by a void lease, and no notice is necessary to a tenant holding over such a tenancy without any fresh agreement, express or implied. *Tress* v. *Savage*, 4 El. & Bl. 36; 18 Jur. 680; 23 L. J. Q. B. 339; *Logan* v. *Herron*, 8 Serg. & R. 459; *Hamit* v. *Lawrence*, 2 A. K. Marsh. 368; *Allen* v. *Jaquish*, 21 Wend. 628.

Notice to quit is not necessary where the person in possession is not in fact a tenant, or where he holds strictly at will, or by sufferance. *Smith* v. *Stewart*, 6 Johns. 46; *Jackson* v. *Moncrief*, 3 Wend. 26; *Jackson* v. *French*, 5 id. 337; *Shorey* v. *Farrell*, 114 Mass. 441.

At common law no notice by a mortgagee was necessary to terminate the rights of a tenant holding by lease from the mortgagor subsequent to the mortgage; or by a purchaser at a foreclosure or other judicial sale, to terminate the rights of the former owner, or of a person in under him. *Keech d. Warne*, 1 Dougl. 21; *Jackson* v. *Robinson*, 4 Wend. 436. But this rule has been changed by statute in many of the American States, and such a notice is now usually required in all cases of unusual tenancy. *Den* v. *Drake*, 2 Green (N. J. L.), 523; *Phillips* v. *Covert*, 7 Johns. 4. Thus it has been held necessary in the case of a tenant from year to year, or for a fixed period, holding over (*Schuyler* v. *Smith*, 51 N. Y. [6 Sick.] 309; 10 Am. Rep. 609; *Jackson* v. *Miller*, 7 Cow. 747); or with one who entered with a view to a future tenancy (*Doe d. Lewis* v. *Beard*, 13 East, 211); or who entered under a lease void by the statute of frauds, or under an agreement for a future lease. *Thomas* v. *Wright*, 9 Serg. & R. 87.

A tenant who occupies and pays rent for land not included in his lease is entitled to notice as to that. *Jackson* v. *Wilsey*, 9 Johns. 268. The rights of one who was permitted by the owner to occupy lands for years without any reservation of rent, cannot be terminated by the heir of such owner without notice. *Den d. Mackay* v. *Mackay*, 1 Penn. (N. J.) 420. An infant reversioner who has become entitled to premises leased from year to year cannot eject the tenant without first giving

notice to quit (*Maddon d. Baker* v. *White*, 2 Term R. 159); and the personal representatives of a deceased tenant from year to year are entitled to notice. *Doe d. Shore* v. *Porter*, 3 Term R. 13. Other cases are cited in the chapter on Ejectment, Vol. 2, p. 87.

A tenancy at will may be terminated by notice given by either party. *Davis* v. *Thompson*, 13 Me. 209. The landlord may terminate it by a demand of possession, or by any equivalent expression of his will, and the lessee may do it by a declaration that he will hold no longer, accompanied by a waiver of possession or a tender of the keys. *Doe d. Price* v. *Price*, 2 M. & S. 464; 9 Bing. 356; *Chalmers* v. *Vignaud's Synd.*, 7 Martin (La.), 98. But a tenant who has quit the premises, need not give notice if the landlord accepts another person as tenant, or does any other act amounting to an assent. *Graham* v. *Anderson*, 3 Harr. (Del.) 364; *Whitehead* v. *Clifford*, 5 Taunt. 518; *Mackeller* v. *Sigler*, 47 How. (N. Y.) 20.

By implication such a tenancy will be terminated by the lessor's exercising any acts of ownership inconsistent with its existence (*Ball* v. *Cullimore*, 2 C. M. & R. 121; *Pollen* v. *Brewer*, 7 C. B. [N. S.] 371; 6 Jur. [N. S.] 509; *Daniels* v. *Davison*, 16 Ves. 252; *Curl* v. *Lowell*, 19 Pick. 25; *Dorrell* v. *Johnson*, 17 id. 263); or by the death either of the lessor or the lessee, or by the desertion of the premises by the lessee. *Say* v. *Stoddard*, 27 Ohio St. 478.

If by the terms of the lease its duration is left optional, without saying at whose option, the law favors the tenant and gives him the option of terminating it. *Dann* v. *Spurrier*, 3 B. & P. 399; *Hersey* v. *Giblet*, 18 Beav. 174; 23 L. J. Chan. 818.

A tenancy from year to year, for so long as both parties please, is terminable at the pleasure of either party at the end of the first or of any succeeding year by a notice to quit. *Doe d. Clark* v. *Smarridge*, 9 Jur. 781. Otherwise, where there are provisions showing the intentions of the parties that it shall continue for two or more years certain, as where it runs "for one year from date and so on from year to year until it shall be determined by notice." *Doe d. Chadborn* v. *Green*, 9 A. & E. 658.

As to the form and sufficiency of a notice to quit, by a landlord, and of its service, see Vol. 2, p. 91. A notice by a tenant must be to his immediate landlord. *Doe d. Morrell* v. *Milward*, 3 M. & W. 328. A defect in such notice, in not fixing the time for quitting, will be waived by the landlord's offering to reduce the rent and make improvements, to induce the tenant to remain. *Boynton* v. *Bodwell*, 113 Mass. 531.

The effect of a notice to quit, by the landlord, will be waived or lost by any act on his part recognizing the tenancy as continuing after the

time of the notice has expired, unless a contrary intention appears. *Doe d. Brierly* v. *Palmer*, 16 East, 53.

There are various contingencies, any one of which happening, will either terminate a tenancy *ipso facto*, or authorize one or the other party to put an end to it. The death or outlawry of either party terminates a tenancy at will, or from year to year, or an under tenancy; but if the tenant dies within the year his rights for the remainder of the year usually pass to his personal representatives. *Robie* v. *Smith*, 21 Me. 114; *Rising* v. *Stannard*, 17 Mass. 282; *Cody* v. *Quarterman*, 12 Ga. 386. Partition in land also has that effect. A tenancy under a lease which is subsequent to a mortgage will be terminated by the lawful entry of the mortgagee for condition broken, or by a sale on foreclosure. *Roe d. Eberell* v. *Lowe*, 1 H. Bl. 447; *Keith* v. *Swan*, 11 Mass. 216; *Gartside* v. *Outley*, 58 Ill. 210; *Burr* v. *Stenton*, 52 Barb. 377; S. C. affirmed, 43 N. Y. (4 Hand) 462; *Duff* v. *Wilson*, 69 Penn. St. 316.

Eviction by the lessor gives the lessee the right to terminate his tenancy, and the eviction by title paramount or the defeat or determination in any other manner of the title which the lessee had at the time of making the lease, will terminate it. *Wheelock* v. *Warschauer*, 34 Cal. 265; *Wood* v. *Partridge*, 11 Mass. 488.

The insolvency of the lessor and the vesting of his title in the assignee with notice to the tenant will have that effect. *Doe d. Davies* v. *Thomas*, 6 Exch. 854; 20 L. J. Exch. 367.

The total destruction of the premises leased, is generally held to put an end to the lease. *Winton* v. *Cornish*, 5 Ohio, 477; *Stockwell* v. *Hunter*, 11 Metc. 448. Especially where there is no covenant to repair, or the landlord having covenanted to repair or rebuild, refuses to do so. *Ainsworth* v. *Ritt*, 38 Cal. 89; *McMillan* v. *Solomon*, 42 Ala. 356; *Fowler* v. *Payne*, 49 Miss. 32; *Graves* v. *Berdan*, 26 N. Y. (12 Smith) 498.

Where the landlord is bound to keep the premises in tenantable repair, his failure to do so has also been held to terminate the lease (*Coleman* v. *Haight*, 14 La. Ann. 564); but not where their defective condition is chargeable to the tenant's own neglect of duty. *Suydam* v. *Jackson*, 54 N. Y. (9 Sick.) 450; *Johnson* v. *Oppenheim*, 55 N. Y. (10 Sick.) 280.

A lease made terminable upon a sale will be terminated by a *bona fide* sale, with such notice as stipulated for, but not by a mere colorable sale. *Miller* v. *Levi*, 44 N. Y. (5 Hand) 489; *Ela* v. *Bankes*, 37 Wis. 89. As to the effect of other provisions of a like character, see *post*,

225, art. 5 of this chapter. A tenancy may also be terminated by merger in a higher title, or a new term.

§ 3. **Termination by surrender.** An express surrender is the yielding up of his particular estate by the tenant to the person who has the immediate reversion or remainder, in the manner provided by law. Such a surrender must, by statute in England, be in writing, under seal, unless the tenancy is one which could be created without writing. Statutes prohibiting the surrender of a term of years, or other interest in lands, except by deed or note in writing, or by operation of law, prevail extensively in this country, but a few States permit it to be done by parol. Under such statutes it has been held that a mere erasure, cancellation or destruction of the lease is not of itself sufficient. *Roe d. Berkely* v. *York*, 6 East, 89; *Doe d. Courtail* v. *Thomas*, 4 M. & R. 218; 9 B. & C. 288; *Raynor* v. *Wilson*, 6 Hill, 469. Nor will an agreement in writing to surrender for a particular purpose operate as a surrender, if the purpose is not effected.

The usual technical words, "surrender and yield up," are not essential to the instrument, but any form of words which sufficiently indicate the intention of the parties will operate as a surrender. *Smith* v. *Mapleback*, 1 Term R. 441. A surrender must be by a party in possession to one who has a higher estate. It must, therefore, be to the lessor himself or to the party legally entitled under him. *Cornish* v. *Searell*, 1 M. & R. 703; S. C., 8 B. & C. 471. And see *Nelson* v. *Thompson*, 23 Minn. 508. An under tenant cannot surrender to the original lessor, nor a tenant for life to one entitled only to a remainder for years; nor can one joint tenant surrender to another. But a lessee for years may surrender to one who is entitled to the reversion, for years, or for a less term. A surrender to an infant is good, unless his dissent appears.

A surrender by operation of law is effected by some less formal act of the parties, from which a mutual agreement by them to consider the surrender as made may be implied; some act of notoriety which estops them from denying that it has taken place. *Lyon* v. *Reed*, 13 M. & W. 285; *Bedford* v. *Terhune*, 30 N. Y. (3 Tiff.) 453. Thus, any agreement between the parties that the term shall be put an end to, which is unequivocally acted upon by both, is such a surrender. *Whitehead* v. *Clifford*, 5 Taunt. 518; *Phene* v. *Popplewell*, 12 C. B. (N. S.) 334; 8 Jur. (N. S.) 1104; 31 L. J. C. P. 235. An actual and continued change of possession by the mutual consent of the parties is a surrender by operation of law, whether the possession is delivered to the landlord himself or to another for him. *Hall* v. *Burgers*, 5 B. & C. 333; *Reeve* v. *Bird*, 1 C. M. & R. 37.

Acceptance of possession by the landlord and his leasing the premises to another, or accepting an under tenant, or an assignee as his tenant, followed by an actual possession by the latter, also operate as such a surrender. *Grimman* v. *Legge*, 8 B. & C. 324; 2 M. & R. 438; *Taylor* v. *Chapman*, Peake's Add. C. 11; *Witman* v. *Watry*, 31 Wis. 638; *Schieffelin* v. *Carpenter*, 15 Wend. 400; *Shepard* v. *Spaulding*, 4 Metc. 416; *Clemens* v. *Broomfield*, 19 Mo. 118. The acceptance of an irregular notice to quit, from a tenant, and an entry by the landlord to make repairs after the tenant had abandoned the premises, amount to elections to treat those acts as effective. *Aldenburgh* v. *Peaple*, 6 C. & P. 212; *Mackeller* v. *Sigler*, 47 How. (N. Y.) 20.

An agreement by a tenant, to purchase the premises from the grantee of his landlord, and until conveyance to pay rent, operates as a surrender of his lease (*Denison* v. *Wertz*, 7 S. & R. 372); and the acceptance of a new lease during an existing lease, whether it be for a longer or a shorter term, is presumptively a surrender of the prior lease. *Abell* v. *Williams*, 3 Daly (N. Y.), 17; *McDonnell* v. *Pope*, 9 Hare, 705; *Livingston* v. *Potts*, 16 Johns. 28. Such new lease must, however, be valid and binding on both parties, otherwise it will not so operate. *Doe d. Egremont* v. *Forwood*, 3 Q. B. 627; *Doe d. Biddulph* v. *Poole*, 11 id. 713; 12 Jur. 450; 17 L. J. Q. B. 143.

A surrender may also be presumed when the term appears to have done the duty for which it was created (*Bartlett* v. *Downes*, 5 D. & R. 526; 3 B. & C. 616; 1 C. & P. 522); but no such presumption can arise as to an unsatisfied term raised for the purpose of securing an annuity. *Doe d. Hodsden* v. *Staple*, 2 Term R. 684; *Doe d. Bowerman* v. *Sybourn*, 7 id. 2; 2 Esp. 496. The finding of the lease in the possession of the lessor with the seals torn off, and the fact that a lease has been granted to another, also raise a presumption of a surrender. *Walker* v. *Richardson*, 2 M. & W. 882.

An absolute surrender must operate immediately, but a lease to commence *in futuro* may operate as an immediate surrender of the first lease (*Doe d. Murrell* v. *Milward*, 3 M. & W. 328), even though the continuance of such new lease may be made contingent upon the performance of some future act by the tenant. *Allen* v. *Jaquish*, 21 Wend. 628; Co. Litt. 218 *b*.

The effect of a surrender is to terminate the relations and the obligations of the parties as landlord and tenant, but it does not relieve the tenant or his surety from the payment of rent already due. *Sperry* v. *Miller*, 8 N. Y. (4 Seld.) 336; *McKenzie* v. *Farrell*, 4 Bosw. (N. Y.) 192. Nor will a surrender by a tenant for lives to his landlord, by a mere confession of waste, under a covenant against waste, defeat the

rights of a mortgagee of the leasehold interest. *Allen* v. *Brown*, 60 Barb. 39. See *Moore* v. *Pitts*, 53 N. Y. (8 Sick.) 91.

§ 4. **Termination of forfeiture.** By the strict rules of the common law almost any act of a tenant, which was inconsistent with his tenancy, worked a forfeiture of his term. These rules, though to some extent relaxed, or abridged by modern statutes regulating the relations of landlord and tenant, yet generally prevail. An alienation by the tenant of the demised estate in fee, by some conveyance which would have the effect to divest the estate of the reversioner, was, of course, such an act, and was formerly a ground of forfeiture; but it has ceased to be so in some of the American States, where, by statute, a conveyance of any kind by a tenant will pass only such estate as he actually has.

Such acts as the acceptance of a lease from or attorning to an adverse claimant, or a stranger, or permitting him to take possession and exercise acts of ownership over the demised premises in opposition to the landlord, or any other act by which the tenant willfully disclaims his tenancy, are still held to be grounds of forfeiture. *Doe d. Ellerbrock* v. *Flynn*, 1 C. M. & R. 137; 4 Tyr. 619; *Jackson* v. *Kingsley*, 17 Johns. 158; *Sharpe* v. *Kelley*, 5 Denio, 430; *Jackson* v. *Vincent*, 4 Wend. 633; *Bolton* v. *Landers*, 27 Cal. 104; *Brown* v. *Keller*, 32 Ill. 151; *Thayer* v. *Waples*, 26 La. Ann. 502. But a mere payment of rent to a third person is not such a disclaimer as will amount to a forfeiture. *Doe d. Dillon* v. *Parker*, Gow. 180.

A denial of the landlord's title, or an adverse claim of title on the part of the tenant, is a ground of forfeiture which entitles the landlord to take possession, or bring ejectment without notice to quit (*Doe d. Cheeser* v. *Creed*, 2 M. & P. 648; 5 Bing. 327; *Landsell* v. *Gower*, 17 Q. B. 589; 16 Jur. 100; 21 L. J. Q. B. 5); but no mere verbal denial of title, or assertion of adverse claim, will have that effect, without matter of record or an actual renunciation of the relation of tenant. *Rees d. Powell* v. *King*, Forrest, 19; 2 B. & B. 514; *Doe d. Graves* v. *Wells*, 2 P. & D. 397; 10 A. & E. 427; *DeLancey* v. *Ganong*, 9 N. Y. (5 Seld.) 9.

An illegal use of demised premises has been held to work a forfeiture. *Machias Hotel Co.* v. *Fisher*, 56 Me. 321.

Voluntary waste works a forfeiture of a tenant at will. In New York this forfeiture is confined to so much of the premises as the waste was committed upon. *London* v. *Greyme*, Cro. Jac. 182; *Cole* v. *Green*, 1 Levinz, 309; *Jackson* v. *Tibbits*, 3 Wend. 341. A provision in a lease for a re-entry in case of the commission of waste is generally

construed to mean waste injurious to the reversion. *Doe d. Darlington* v. *Bond*, 5 B. & C. 855; 8 D. & R. 738.

The most common cases of forfeiture are those which arise upon breaches of conditions in leases, for which the landlord is expressly authorized to re-enter. In these cases the landlord, and he alone, has the option to terminate the tenancy, and he can do so only by a re-entry. *Shattuck* v. *Lovejoy*, 8 Gray, 204.

Provisos for re-entry can only operate during the term (*Johns* v. *Whitley*, 3 Wils. 127); and the fact that the lessee is a married woman, or under other disability, will not prevent their operation. *Garrett* v. *Scouten*, 3 Denio, 334. Such provisos are to be construed, not with the strictness of conditions at common law, but fairly and according to the rules applicable to other contracts. *Doe d. Davis* v. *Elsam*, M. & M. 189. In order to a forfeiture, the re-entry clause must clearly apply to the particular covenant broken, and the breach must be such an one as was intended by the parties to be provided against. *Crawley* v. *Price*, 13 Eng. R. 248; L. R., 10 Q. B. 302.

A proviso for re-entry if the tenant makes default in the performance of any of the covenants in the lease extends only to affirmative covenants, *i. e.*, such as are to be performed by him. *Doe d. Palk* v. *Marchetti*, 1 B. & Ad. 715. A proviso for a forfeiture for doing or causing to be done any act contrary to or in breach of any covenants does not extend to an omission to repair according to covenant (*Doe d. Abdy* v. *Stevens*, 3 B. & Ad. 299); but a proviso for re-entry "if the lessee shall make default in the performance of any other covenants which on his part are or ought to be observed, performed and kept," has been held to apply to negative as well as positive acts. *Croft* v. *Lumley*, 6 H. L. Cas. 672; 4 Jur. (N. S.) 903; 27 L. J. Q. B. 321.

A forfeiture caused by a breach, either by the lessee or by one to whom he has assigned a portion of the premises, of a covenant for which the lease prescribes a forfeiture, extends to the whole of the demised premises. *Clarke* v. *Cummings*, 5 Barb. 339. Where the sole condition upon which the lease of a house is made to depend is the continuous running of a mill by the tenant, his abandonment of the mill is held an abandonment of the house, and at the option of the landlord it terminates the lease. *Crawley* v. *Mullins*, 48 Mo. 517.

A forfeiture for the breach of a covenant against assignment occurs only upon a voluntary assignment of the lessee's entire interest. *Doe d. Pitt* v. *Hogg*, 4 D. & R. 226; 1 C. & P. 169; *Shee* v. *Hale*, 13 Ves. 404; *Lear* v. *Leggett*, 1 Russ. & M. 690; *Jackson* v. *Corliss*, 7 Johns. 531; *Roosevelt* v. *Hopkins*, 33 N. Y. (6 Tiff.) 81; *Smith* v. *Putnam*, 3 Pick. 221. An underletting is not an assignment, nor is an assign-

ment a breach of a covenant against underletting. *Lynde* v. *Hough*, 27 Barb. 415.

Under provisos in leases for re-entry in case the tenant commits any act of bankruptcy, or suffers any judgment or extent likely to affect the estate, or permits any sale at auction on the premises, or builds upon them, a forfeiture will occur whenever there is a clear breach of the condition. *Doe d. Bridgman* v. *David*, 1 C. M. & R. 405; *Tolernan* v. *Portbury*, 2 Eng. R. 89; L. R., 7 Q. B. 344; *Domoile* v. *Colville*, 7 Ir. R. C. L. 68.

The non-payment of the stipulated rent is not a ground of forfeiture, unless the lease expressly makes it so. *Van Rensselaer* v. *Jewett*, 2 N. Y. (2 Comst.) 144. In order to enforce such a forfeiture, the common law required a formal demand of the rent due to be first made, unless that was waived by an express provision in the lease that it need not be made, or that the landlord might re-enter if the rent was in arrear for a specified time. *Doe d. Forster* v. *Wandlass*, 7 Tenn. 117. This formal demand was required to be of the exact amount due for the last current quarter or period, and must be made before sunset of the day when it became due, and at the front door of the house or the most notorious place on the demised premises; or, if any other place for payment was specified, at such place. Co. Litt. 202, a; *Jackson* v. *Harrison*, 17 Johns. 66; *Connor* v. *Bradley*, 1 How. (U. S.) 211. The strict rules of the common law on this subject have been greatly modified by various statutes, both in England and in this country; and some decisions under these statutes are given under the title Ejectment. Vol. 3, p. 54.

No one but the lessor himself, or one who possesses his rights, can take advantage of a forfeiture; nor will it execute itself, but he mus exercise his option and re-enter, otherwise the tenancy will continue, notwithstanding the lease provides that it shall be void, or the term shall cease, upon breach of the covenants by tenant. *Arnsby* v. *Woodward*, 6 B. & C. 519; *Rede* v. *Farr*, 6 M. & S. 121; *Reid* v. *Parsons*, 2 Chit. 247. The lessor has that right, even though he has no reversion (*Doe d. Freeman* v. *Bateman*, 2 B. & Ald. 168); but a *cestui que trust* has not. *Doe d. Barker* v. *Goldsmith*, 2 C. & J. 674; 2 Tyr. 710.

A forfeiture by breach of covenant may be waived, unless the lease by its terms becomes absolutely void upon such breach. *Doe d. Bryan* v. *Bancks*, 4 B. & Ald. 401. In order to constitute any act of the lessor a waiver of a forfeiture, it is essential that he have knowledge of such forfeiture at the time. *Doe* v. *Birch*, 1 M. & W. 402; *Clarke* v. *Cummings*, 5 Barb. 340. The receipt and acceptance of rent which

has accrued subsequent to a forfeiture, without any assertion of such forfeiture, has been held a waiver in many cases of breach of covenant. *Hunter* v. *Osterhoudt*, 11 Barb. 33; *Keeler* v. *Davis*, 5 Duer, 507; *Bowman* v. *Foot*, 29 Conn. 331; *Walrond* v. *Hawkins*, L. R., 10 C. P. 342; S. C., 12 Eng. R. 406; *Tuttle* v. *Bean*, 13 Metc. 275; *Indianapolis Mf., etc., Union* v. *Cleveland, etc., Ry. Co.*, 45 Ind. 281; *Doe d. Gatehouse* v. *Rees*, 4 Bing. N. C. 384; 6 Scott, 161. Distraining for rent in like cases if effectual, or bringing an action therefor, will have the same effect. *Newman* v. *Rutter*, 8 Watts, 55; *Silver* v. *Kendrick*, 2 N. H. 160; *Gomber* v. *Hackett*, 6 Wis. 323; *Stuyvesant* v. *Davis*, 9 Paige, 427; *Dendy* v. *Nicholl*, 4 C. B. (N. S.) 376; 27 L. J. C.P. 220.

The mere receipt of rent after the commencement of a suit in ejectment, or of that which accrued during the life of a notice to repair, does not operate as a waiver. Nor does the giving of notice to repair, or the allowing of further time to repair. *Few* v. *Perkins*, L. R., 2 Exch. 92; *Gregory* v. *Wilson*, 9 Hare, 682; *Fryett* v. *Jeffreys*, 1 Esp. 393.

A waiver will extend only to an existing forfeiture, and will not affect one subsequently accruing. *Doe d. Taylor* v. *Johnson*, 1 Stark. 411. A continuing breach, such as neglect to keep the premises insured, or to keep up an orchard, according to covenant, or a use of the premises in a manner or for a trade which is prohibited by the lease, or the like, is not waived by the receipt of rent after the first breach. *Doe d. Baker* v. *Jones*, 5 Exch. 498; 19 L. J. Exch. 405; *Doe d. Ambler* v. *Woodbridge*, 9 B. & C. 376; *Lloyd* v. *Crispe*, 5 Taunt. 249.

A forfeiture may also be waived by other acts of the lessor, showing his intention that the lease shall continue, such as giving a notice to quit at the end of a half year, or permitting the tenant to expend money in improvements after the forfeiture. *Ward* v. *Day*, 33 L. J. Q. B. 254; 5 B. & S. 359. But mere delay to enforce a forfeiture, without any positive act on the part of the landlord, is not a waiver. *Perry* v. *Davis*, 3 C. B. (N. S.) 769. A notice to repair within three months is so far a waiver of a forfeiture for the breach of a general covenant to repair, that the lessor cannot sue in ejectment until the expiration of the notice; but the right then acquired is not waived, but is merely suspended, by giving further time to repair. *Doe d. Morecraft* v. *Meux*, 7 D. & R. 98; 4 B. & C. 606; 1 C. & P. 346; *Doe d. Rankin* v. *Brindley*, 1 N. & M. 1; 4 B. & Ad. 84.

At common law, a forfeiture for non-payment of rent was saved by a personal tender of it, after demand, but before midnight of the day when it became due; and now, by statute in some of the American

States, a tender even at a later date will have that effect. *Lush* v. *Druse*, 4 Wend. 313; *Chapman* v. *Kirby*, 49 Ill. 211; *Blackman* v. *Welsh*, 44 Mo. 41; *White* v. *McMurray*, 2 Brewst. (Penn.) 485.

Relief against forfeitures is also given in equity, where the breach was not willful, and where compensation in damages can be calculated with certainty. *Giles* v. *Austin*, 62 N. Y. (17 Sick.) 486; S. C. affirming S. C., 6 J. & Sp. 215; *Rector, etc.*, v. *Higgins*, 48 N. Y. (3 Sick.) 533; *Nelson* v. *Carrington*, 4 Munf. 332; *Bracebridge* v. *Buckley*, 2 Price, 200; *Hill* v. *Barclay*, 16 Ves. 402.

§ 5. **Of holding over.** It is the duty of a tenant, as soon as his tenancy expires by its own limitation, to peaceably and quietly surrender the possession of the whole of the demised premises, together with all buildings, fixtures and improvements belonging thereto, to his landlord, or to some one authorized by him to receive them. If he neglects or refuses so to do, even though he retains them but for a few days with the intention of removing, the landlord may treat him either as a trespasser, or as a tenant for another year or for a shorter term of the same extent as that which has expired. *Noel* v. *McCrory*, 7 Coldw. (Tenn.) 623; *Schuyler* v. *Smith*, 51 N. Y. (6 Sick.) 309; 10 Am. Rep. 609; *Witt* v. *Mayor of N. Y.*, 6 Robt. (N. Y.) 441; 5 id. 248. His liability for the rent does not cease until such complete surrender, not only by himself but by his sub-tenants. *Harding* v. *Crethorn*, 1 Esp. 57; *Ibbs* v. *Richardson*, 1 P. & D. 618; 9 A. & E. 849.

The tenant is bound by the election of the landlord to treat him as a tenant in such a case, and cannot avoid the tenancy so forced upon him. *Hemphill* v. *Flynn*, 2 Penn. St. 144; *Harkins* v. *Pope*, 10 Ala. 493. His new tenancy is, however, only at sufferance, so long as there is no agreement or consent on the part of the landlord to a more permanent holding (*Russell* v. *Fabyan*, 34 N. H. 223); but the acquiescence of the latter may be presumed from his receipt of the rent, or even from lapse of time without objection on his part. *Conway* v. *Starkweather*, 1 Denio, 113.

A tenant for one year, or from year to year, under either a verbal or a written lease, who holds over with the consent of his landlord, becomes entitled to all the rights of a tenant for another year. *Usher* v. *Moss*, 50 Miss. 208; *Moore* v. *Beasley*, 3 Ham. (Ohio) 294; *Danforth* v. *Sargent*, 14 Mass. 491; *Brewer* v. *Knapp*, 1 Pick. 332. A lessee for years who so holds over becomes a tenant from year to year, and is subject to do all the covenants and conditions of the original lease which are compatible with a yearly holding. *Laguerenne* v. *Dougherty*, 35 Penn. St. 45. Generally, a tenant holding over without any new agreement will be deemed to hold subject to all the terms and covenants of

his original lease. *Hyatt* v. *Griffiths*, 17 Q. B. 505; *Thomas* v. *Packer*, 1 H. & N. 669; 3 Jur. (N. S.) 143; 26 L. J. Exch. 207; *Parker* v. *Hollis*, 50 Ala. 411; *Fronty* v. *Wood*, 2 Hill (S. C.), 367; *Hunt* v. *Wolfe*, 2 Daly, 298; *Diller* v. *Roberts*, 13 Serg. & R. 60; *Dorrill* v. *Stephens*, 4 McCord (S. C.), 59. A tenant may bind himself to pay an increased rent, either by express agreement, or by holding over after notice that it will be required, and even then the terms of the old lease will bind him so far as applicable. *Digby* v. *Atkinson*, 4 Camp. 275; *Roberts* v. *Hayward*, 3 C. & P. 432.

By statute in England, and in some of the American States, a willful holding over, after the landlord has demanded possession, or given notice to quit, or after the tenant himself has terminated his lease by a notice as therein provided, renders him liable for double rent, and sometimes for special damages. Such statutes must be construed with reference not only to the language employed, but to the object sought, which is to punish fraud and contumacy, and not a holding over under a *bona fide* claim of right. *Wright* v. *Smith*, 5 Esp. 205; *Swinfen* v. *Bacon*, 6 H. & N. 846; 30 L. J. Exch. 368. This double rent is recoverable only from the time of the demand or notice; and the receipt of single rent after the expiration of the notice, or any other act showing that intention, is a waiver of the penalty. But the bringing of an ejectment suit after service of the notice does not have that effect. *Ryal* v. *Rich*, 10 East, 48; *Soulsby* v. *Neving*, 9 id. 310. To render the tenant liable to double rent for refusing to leave after notice given by himself, that notice must be direct and positive. *Farrance* v. *Elkington*, 2 Camp. 591; *Johnstone* v. *Hudlestone*, 7 D. & R. 411; 4 B. & C. 922.

Other statutes make guardians, trustees of infants, husbands seized in right of their wives, and other persons having estates which are determinable upon any life or lives, who hold over after the termination of their particular estates, liable as trespassers for the full value of the profits received during their wrongful possession.

ARTICLE IV.

PARTIES TO A LEASE.

Section 1. In general. Any person who is seized or possessed of lands or tenements may grant a lease thereof, for any period not exceeding his own interest, unless he is under some legal disability. Possession in law or in fact in the lessor is absolutely essential under the statutes generally prevailing, and a lease given when the land is in the

actual possession of an adverse claimant is void. *Iseham* v. *Morrice*, Cro. Car. 109. But possession will be deemed to follow the ownership, unless there is adverse possession; and a seizin once actually existing will be presumed to continue. *Fosgate* v. *Herkimer Manuf. Co.*, 9 Barb. 287; S. C. affirmed, 12 N. Y. (2 Kern.) 580. So far is this rule carried, that one in actual possession, though wrongfully, can make a lease, which can be avoided only on eviction by paramount title. And yet one who has been disseized of land may execute a lease and deliver it in escrow, to take effect when he enters and recovers possession. And others who have an absolute right of entry, such as a lessee for years; an heir to whom land has descended; or a remainderman, even while the life tenant is in possession, may make a valid lease before actual entry. And so may a *cestui que trust*, where by the statute of uses the possession is transferred to him (*Bellingham* v. *Alsop*, Cro. Jac. 52, 408); and one who has an undisputed reversion can charge it by a lease, to take effect in interest when his reversion is reduced to possession. *Mitford* v. *Fenwick*, And. 288. But it is held in Pennsylvania, that a purchaser at sheriff's sale, who has not received his deed, cannot make a valid lease. *Hall* v. *Benner*, 1 Pen. & W. 402.

Even one who has no title at the time he undertakes to lease, or is a mere disseizor, may give a lease which will be good by estoppel if he afterward acquires title during the term granted (*Jackson* v. *Murray*, 12 Johns. 201; *Cocke* v. *Brogan*, 5 Pike, 693; *Webb* v. *Austin*, 8 Scott [N. R.] 419); unless his want of title appears by the lease itself. *Hermitage* v. *Tomkins*, 1 Ld. Raym. 729. If two join a lease, it will be good though only one of them has an interest in the premises. *Brereton* v. *Evans*, Cro. Eliz. 700. A lease for years, which cannot take effect immediately by reason of a prior lease of the premises, will operate by estoppel, for so much of the term as remains to the lessor after the prior lease is determined.

A lease by estoppel, to bind either party must bind both (*Welland Canal* v. *Hathaway*, 8 Wend. 9, 480; *Bolling* v. *Mayor*, 3 Rand. 563); and then it will also bind the heir or other privy in estate who derives title from either party. *Webb* v. *Austin*, 8 Scott (N. R.) 419; *Braintree* v. *Hingham*, 17 Mass. 432. Such a lease by a tenant for life will not, however, extend beyond his life, or bind his heir, even though before his death he purchased the reversion. A man may even become a tenant of his own land by estoppel, as, by accepting a lease from another who is under no disability; and leases by estoppel may, in other cases, be created by various acts *in pais*, such as livery, entry, acceptance of rent, and the like.

An infant's lease is voidable by himself, at or before his majority, or

within a reasonable time afterward; but until he avoids it, the adult party will be bound thereby. *Roof* v. *Stafford*, 7 Cow. 179; *Bool* v. *Mix*, 17 Wend. 119; *Wheaton* v. *East*, 5 Yerg. 41; *Worcester* v. *Eaton*, 13 Mass. 371. To render a lease by an infant binding on him after he attains majority, no express ratification is usually deemed necessary, unless required by some statute, but any acts which reasonably imply an affirmance, such as the receipt of rent accruing after his majority, and the like, are sufficient. *Kline* v. *Beebe*, 6 Conn. 494. But some express act of disaffirmance on his part after coming of age is generally required to avoid the lease. The mere execution of another lease, or of a conveyance of the property to a purchaser for value, is not such a disaffirmance, unless it is so inconsistent with the former lease that the two cannot stand together. *Dominick* v. *Michael*, 4 Sandf. (N. Y.) 375. No one but the infant himself, or his personal representatives, can avoid his lease. *Jackson* v. *Todd*, 6 Johns. 257; *Roberts* v. *Wiggin*, 1 N. H. 97.

An infant may also take a lease and avail himself of its benefits, but he may if he chooses, within a reasonable time after he comes of age, disaffirm his liability for rent or the performance of covenants. If, however, the use of the premises comes within the definition of necessaries, he is liable for the rent. And if he continues in the possession of the premises after full age, he thereby affirms the existing lease.

Guardians of infants, having the power of guardians in socage, may usually demise their ward's land during their minority. *Byrne* v. *Van Hoesen*, 5 Johns. 66; *Field* v. *Schieffelin*, 7 Johns. Ch. 154. See *ante*, title Guardian and Ward. But it has been held that a mere natural guardian has no such power. *Putnam* v. *Ritchie*, 6 Paige, 390; *May* v. *Calder*, 2 Mass. 55; *Anderson* v. *Darby*, 1 Nott & McC. 369; *Magruder* v. *Peter*, 4 Gill & J. 323.

The general rule, that contracts made by idiots or lunatics while in that condition are void, applies as well to leases as to other contracts. *Faulder* v. *Silk*, 3 Camp. 126. This is especially so where advantage has been taken of their condition. But in many cases it has been held that acts or deeds of a lunatic, before he has been placed under guardianship, are merely voidable, while those subsequent are absolutely void. *Jackson* v. *Gumaer*, 2 Cow. 552; *Pearl* v. *McDowell*, 3 J. J. Marsh. 658; *Wait* v. *Maxwell*, 5 Pick. 217; *Webster* v. *Woodford*, 3 Day, 90; *L'Amoreux* v. *Crosby*, 2 Paige, 422. The committees or guardians of such persons are usually authorized by law to lease their property. *Knipe* v. *Palmer*, 2 Wils. 130

A man who is *compos mentis* can bind himself by a lease, though he may be of weak mind, illiterate, deaf or blind; but he can avoid the

lease if induced to execute it by fraud or misrepresentation (*Jackson* v. *Hayner*, 12 Johns. 469; *Farnam* v. *Brooks*, 9 Pick. 212; *Dodds* v. *Wilson*, 1 Const. [So. Car.] 448); but a person who is deaf, dumb and blind from his nativity, labors under an absolute incapacity. *Brown* v. *Brown*, 3 Conn. 299.

Old age alone does not incapacitate a person from granting a lease, nor does it raise any presumption that the lease was procured by fraud or imposition, such as would defeat it. *Lewis* v. *Pead*, 1 Ves. Jr. 19. Duress of a lessor renders his lease not absolutely void, but voidable merely after he recovers his free agency. His intoxication at the time of executing a lease, if extreme, so as to deprive him of the exercise of reason, has been held in common cases to render the lease absolutely void, while in others it is held merely voidable. *Conant* v. *Jackson*, 16 Vt. 335; *Prentice* v. *Achorn*, 2 Paige, 31; *Pitt* v. *Smith*, 3 Camp. 33; *Reinicker* v. *Smith*, 2 Har. & J. 421; *White* v. *Cox*, 3 Hay. 79.

At common law, a married woman could not lease her lands without the concurrence of her husband; but he could lease them and take the rents and profits so long as the marriage contract existed, and if he became tenant by curtesy, so long as he lived. If the wife's property rights were restored by the death of her husband or by divorce, that would terminate the lease, unless she subsequently affirmed it. But statutes greatly modifying these rules of the common law now prevail generally in this country, and these usually allow a married woman to control her own real estate without the concurrence of her husband.

A married woman may also hold under a lease, at least until her husband dissents, and generally he will be liable for the rent. If a *feme sole* takes a lease and afterward marries, her responsibility as lessee will devolve on her husband. *Campbell* v. *Holloway*, 7 Johns. 81; *Rotch* v. *Miles*, 2 Conn. 638.

A tenant for life can make a lease from year to year or for years, but his death will absolutely terminate it, unless some power conferred upon him by the owner in fee or the creator of the estate, or by statute, enables him to give it a longer duration. *Story* v. *Johnson*, 2 Y. & C. 586. His lessee holding over will be a mere tenant at sufferance, unless his lease is recognized and confirmed by the succeeding owner, by some act amounting to a new demise or an estoppel. *James d. Ambray* v. *Jenkins*, Bull (N. P.) 96; *Doe d. Tucker* v. *Morse*, 1 B. & Ad. 365. If the remainderman or reversioner joins in the lease with the life tenant, that is the lease of the one confirmed by the other.

A tenant from year to year or for years can underlet, unless restricted by the terms of his lease.

One joint tenant or coparcener in real property may make a lease of

his undivided interest for life, for years, or at will, or several or all may join and demise their shares or the entire estate. *Cowper* v. *Fletcher*, 6 B. & S. 464; 34 L. J. (Q. B.) 187; 13 W. R. 732; 12 L. T. (N. S.) 420. Tenants in common may also lease their individual shares, or may all join in a single lease. Any of such tenants may lease his share to his co-tenant. *Keay* v. *Goodwin*, 16 Mass. 1.

A mortgagor can lease the mortgaged premises; but at common law the mortgagee was not bound by a lease granted subsequent to his mortgage, but might eject the tenant as well as the mortgagor upon default, although by a lease prior to his mortgage, he might recover the rent from the tenant, unless it had been paid to the mortgagor before notice of his claim. *Rawson* v. *Eicke*, 7 Ad. & El. 451; *Moss* v. *Gallimore*, 1 Doug. 279; *Babcock* v. *Kennedy*, 1 Vt. 457; *Coker* v. *Pearsall*, 6 Ala. 542; *Hutchinson* v. *Dearing*, 20 id. 798. Under modern statutes prohibiting actions of ejectment by mortgagees, and protecting mortgagors in their possession until the expiration of the time given for redemption, it would seem that mortgagors or owners of the equity of redemption should have power to lease and be entitled to the rents and profits until the mortgagees or purchasers become entitled to possession; and it has been expressly so decided in New York and Massachusetts (*Clason* v. *Corley*, 5 Sandf. 447; *Mayo* v. *Fletcher*, 14 Pick. 525; *Gibson* v. *Farley*, 16 Mass. 280); and in Michigan it is held that, until foreclosure, the mortgagee cannot receive the attornment of the mortgagor's tenant. *Hogsett* v. *Ellis*, 17 Mich. 351.

A mortgagee, not being the real owner of the estate, has no power before foreclosure to lease the property so as to bind the mortgagor when he comes to redeem, except in a case of absolute necessity and to avoid an apparent loss. *Larned* v. *Clarke*, 8 Cush. 29. Redemption by the mortgagor usually terminates the lease. *Holt* v. *Rees*, 46 Ill. 181. But both may join in a lease, and thus render it effectual. In such a case, the lessee's covenants should be with the mortgagee, so as to run with the land.

The entry of a judgment against a land owner does not affect his right to grant a lease of his land. *Doe d. Putland* v. *Hilder*, 2 B. & Ald. 782.

A corporation may grant or take a lease, unless it is specially restricted by law Such lease should be in the corporate name, though an immaterial variance will not avoid it. At the present day the corporate seal is not usually held necessary; but the lease must be executed by officers or agents who are duly authorized. A corporation may also bind itself by entering upon and enjoying premises in pursuance of a lease, purporting to be by its authority, and paying rent. *Long Isl. R. R.* v. *Marquand*, 6 N. Y. Leg. Obs. 160.

Trustees holding the legal title to land can grant leases, limited by the quantity of estate they possess. Their authority is usually joint, and must be exercised by them jointly. *Sinclair* v. *Jackson*, 8 Cow. 548. A lease granted by trustees, without the concurrence of the beneficiary, is subject to the control of a court of equity, if the lessee had notice of the trust. As the beneficiary cannot give a valid lease without the concurrence of the trustees, it is advisable that both or all should join in a lease. *Blake* v. *Foster*, 8 Term, 487; *Malpas* v. *Ackland*, 3 Russ. 273. In order that the covenants may run with the land, they should be to the trustee, but the rent may be reserved generally. *Webb* v. *Russell*, 3 Term, 393. The time for which a trustee may grant a lease is limited by the circumstances of the particular case, and not by the period of the trust estate; but the trustee or his lessee must be prepared to show its reasonableness, if called in question. *Atty.-Gen.* v. *Owen*, 10 Ves. 555; *Greason* v. *Keteltas*, 17 N. Y. (3 Smith) 491; *Naylor* v. *Arnitt*, 1 Russ. & Mylne, 501.

An executor can demise lands devolved upon him by the will of his testator, even before probate; and, if there be several executors, either of them may do so. *Simpson* v. *Gutteridge*, 1 Mad. 616. At common law, an executrix, if a married woman, could not act without the concurrence of her husband, but he might act in her place, without her consent.

An administrator can lease only when specially authorized to do so. *Bank of Hamilton* v. *Dudley*, 2 Peters, 492; *Roe d. Bendall* v. *Summerset*, 2 W. Bl. 694. He cannot make a valid lease of premises which were specially bequeathed, without the concurrence of the devisee. See Vol. 2, tit. Executors and Administrators.

Receivers appointed by order of the court may be specially authorized to grant leases.

An agent may execute a lease for his principal, provided he has proper authority and pursues it strictly, acting in the name of his principal, and for his benefit. His authority may be verbal, unless required by law to be in writing; and a subsequent ratification or adoption of his acts will supply the want of previous authority. As a general rule he cannot take a lease for himself of property which he is employed to let.

Aliens were formerly subjected to disabilities in respect to acquiring real property, but they have been to a great extent removed by statute both in England and in this country. Whether aliens can now grant leases depends upon the statutes on that subject, which should therefore be examined.

ARTICLE V.

FORM AND NATURE OF A LEASE.

Section 1. In general. A lease for life must be under seal, but one for years or a less term may be in writing not under seal, or by verbal agreement only, except where otherwise prescribed by statute. If intended to include the usual covenants, it must be sealed.

A lease must be supported by some valuable consideration. This may be the usual one, of a rent reserved, or it may be natural affection, money, animals, produce or services, such as would support any other contract. Where a rent is to be paid, but its amount is not fixed, the law fixes it at the reasonable worth of the use of the premises. *Failing* v. *Schenck*, 3 Hill, 344; *State* v. *Page*, 1 Spears (S. C.), 408; *Scrantom* v. *Booth*, 29 Barb. 171.

The date of a lease is not a matter of substance, and an omission of or mistake in the date does not vitiate the lease. If it has no date, or an impossible one, and no time is fixed for its commencement, it will commence from delivery. A reference to the date in the body of a lease which has a sensible date is to that date, and not to its delivery; but the date is not conclusive as to the delivery, for either party may show that delivery took place on a different day. *Church* v. *Gilman*, 15 Wend. 656.

A lease should contain the names of the parties. If executed by an agent of the lessor it should run in the name of the principal, and to the intended lessee. If persons who describe themselves in the caption as trustees, or agents, execute in their individual names, and covenant as such, they bind themselves and not their principal. *Stobie* v. *Dills*, 62 Ill. 432; *Kiersted* v. *Orange, etc., R. R. Co.*, 1 Hun, 151; S. C., 3 N. Y. Sup. (T. & C.) 662. A sealed lease will be void if the name of the lessee be not filled in before delivery. *Jackson* v. *Titus*, 2 Johns. 430. The omission or insertion of the middle name of either party is immaterial; and a misspelling of or variance in the name of a corporation, not making it materially different from the true name, will not affect its validity. *McCarthy* v. *Noble*, 5 N. Y. Leg. Obs. 380.

No particular form of words is necessary to constitute a lease; but whatever terms express the intention of the one party to divest himself temporarily of the possession of his property, and of the other to receive and hold it, will be sufficient. *Hallett* v. *Wylie*, 3 Johns. 47; *Thornton* v. *Payne*, 5 id. 74; *Maverick* v. *Lewis*, 3 McCord (S.C.), 211. The terms usually employed are "demise, grant, lease and to farm

let;" but a covenant to stand seized to the use of the covenantee, or a license to enter and enjoy, will operate as a lease (*Right d. Bassett* v. *Thomas*, 3 Burr. 1446; *Right d. Green* v. *Proctor*, 4 id. 2209); and so will an agreement between vendor and vendee, by separate instruments, that a person named shall be a tenant to the latter (*Doe d. Jacklin* v. *Cartright*, 4 East, 29); and a recital in a will that the testator has leased, will operate as a lease by way of estoppel. *Denn* v. *Cornell*, 3 Johns. Cas. 174.

A lease must describe the premises demised with reasonable certainty, otherwise it is void. *Dingman* v. *Kelly*, 7 Ind. 717; *Pierce* v. *Minturn*, 1 Cal. 470. Where, in the description, numerous particulars are mentioned, all of which do not concur, the intent is to be ascertained in the same manner and by the same kind of evidence as in the case of other contracts. If the premises are bounded on a river, without specification of the exact line, the lease is presumed to go to the center and carry half of the bed and soil of the river. *Dwyer* v. *Rich*, 6 Ir. C. L. 144. Where a lease described the premises as those which a person "now occupies," it was held to carry only so much as was actually occupied by him, and a building or a gateway connected with the premises, but not occupied by him, was held to be excluded. *Magee* v. *Lavell*, 9 L. R. C. P. 107, 8 Eng. Rep. 423; 43 L. J. C. P. 131; 22 W. R. 334; *Dyne* v. *Nutley*, 14 C. B. 122; 2 C. L. R. 81.

Ordinarily, the grant of a thing will pass all such things as are directly incident to it and necessary to its enjoyment, unless they are expressly reserved. *Riddle* v. *Littlefield*, 53 N. H. 503; 16 Am. Rep. 388. A lease of a house carries the land under its eaves and projections, also its garden; of a house and barn, the land necessary to their complete enjoyment; of a farm, all the buildings upon it; and of an interior parcel of land, a right of way to it over the grantor's other lands. *Sherman* v. *Williams*, 113 Mass. 481; 18 Am. Rep. 522; *Hay* v. *Cumberland*, 25 Barb. 594. But an easement will pass only where it is necessary, and will cease with the necessity. *Kooystra* v. *Lucas*, 1 D. & R. 506; 5 B. & Ald. 830; *Skull* v. *Glenister*, 11 W. R. 368; 16 C. B. (N. S.) 81; 33 L. J. C. P. 185.

Recitals in a lease sometimes operate by way of estoppel; but an erroneous recital is generally held immaterial, unless it shows that the lessor had no interest in the subject-matter of the demise. *Hermitage* v. *Tomkins*, 1 Ld. Raym. 729; *Jackson* v. *Streeter*, 5 Cow. 529; *Foot* v. *Berkley*, 1 Vent. 33.

A reservation of rent is not essential, nor, if inserted, need it be in any particular words or form. The usual terms are "yielding and pay-

ing," or "provided the lessee shall pay" a sum specified, or "in consideration of the rent aforementioned." If the reservation is in general terms without saying to whom, the law will apply it according to the nature of the lessor's interest. If it be special, it should be to the person from whom the lessee derives his estate, or to the legal owner, and not to a stranger. *Gilbertson* v. *Richards*, 4 H. & N. 277; *Frontin* v. *Small*, Stra. 705. But a reservation of rent to the lessor's heirs has been held good, where the lease was not to commence until after his own death. *Oates* v. *Frithe*, 2 Rol. Abr. 447. Courts formerly gave different effects to leases of a freehold, where the reservation of rent was to the lessor and his heirs;—to him and his executors;—to him and his assigns; or to him, his executors, administrators or assigns; but, probably in all such cases, especially where the intent appears that rent shall be paid during the whole term, the rent will now be held to follow the reversion. Taylor's Land & Ten., § 156.

An exception may be inserted in a lease restraining, explaining or qualifying its general terms. The office of an exception is to sever some existing component part of the thing demised, which would otherwise pass. It will be void if it does not express the thing excepted with reasonable certainty (*Dorrell* v. *Collins*, Cro. Eliz. 6); or if it excepts that which is expressly granted by the lease, or that as to which the lessor had no right or responsibility. The thing excepted will include every thing dependent on it, and necessary to its enjoyment, such as a right of entry to enjoy or remove it, and the like. *Cardigan* v. *Armitage*, 2 B. & C. 207. A saving out of it will defeat the exception to that extent. *Leigh* v. *Shaw*, Cro. Eliz. 372.

A reservation is properly the retaining of some right or profit to arise from the subject of the demise, which had previously no separate existence. An express reservation is necessary whenever a lessor wishes to retain a right of way, or any other right or control over the demised property. *Brunton* v. *Hall*, 1 Q. B. 792; 1 G. & D. 207; 6 Jur. 340.

A seal, in any case where a lease is required by law to be under seal, must be affixed in the manner prescribed by the law of the place which is to govern the particular lease; whether that be an impression upon wax or wafer, or upon the paper on which the instrument is written, or a mere scroll. It is usual, where several persons execute the same instrument, to affix a separate seal for each, but that is not essential, as the seal of one may be deemed adopted by the other or others. See *ante*, Vol. 2, 494, tit. Deeds.

When in writing, and not required to be under seal, the mere signatures of the proper parties is sufficient. The place of signature is not

usually deemed material, but a statute requiring certain contracts to be "subscribed," has been held to require the name to be actually put at the bottom or foot of the contract. *Davis* v. *Shields*, 26 Wend. 341, 494. *James* v. *Patten*, 6 N. Y. (2 Seld.) 9, 16. A lease which contains covenants by both parties should be executed by both. *Thompson* v. *Leach*, 2 Vent. 198; 3 Mod. 296. They may execute as many copies or counterparts as there are parties, each retaining one.

Witnesses to leases were not required by the common law, but are made necessary by statute in some of the American States. The same may be said as to acknowledgment and recording, for the purpose of making a lease notice to subsequent purchasers or incumbrancers. The omission of the latter formalities will not affect the validity of a lease as between the parties.

Delivery is essential to give effect to a lease and vest the interest intended to be conveyed. This must be to the lessee himself or to some one authorized by him to receive it; but if placed on record for his benefit, his subsequent assent to it renders the delivery valid. Sending by mail to him or to some one for his use, is also sufficient. If delivered in escrow, it will, on its final delivery after performance of the condition, take effect from the time of the first delivery. See Vol. 2, tit. Deeds.

§ 2. **Construction of a lease.** In this connection only general principles can be stated. A lease is to be construed according to the intention of the parties, and that is to be ascertained, if possible, from the terms of the instrument itself; or, if there be several instruments, from their terms as construed together. *Weak d. Taylor* v. *Escott*, 9 Price, 595. When clearly ascertained, that intent must prevail, even though it be in opposition to the strict letter of the contract. *Hathaway* v. *Power*, 6 Hill, 453; *Tracy* v. *Albany Exch. Co.*, 7 N. Y. (3 Seld.) 472. A promise will be construed as the promisor knew that the promisee understood it. *Barlow* v. *Scott*, 24 N. Y. (10 Smith) 40. If a word, which is material in order to give other words their proper effect, appears to have been omitted by mistake, it will be deemed inserted. *Wight* v. *Dickson*, 1 Dow, 141. Words which are inapplicable or repugnant to the tenancy evidently intended to be created, are to be rejected. *Strickland* v. *Maxwell*, 2 C. & M. 539. In a lease by indenture, words are not to be construed most strongly against the one party, or most beneficially for the other, but are to be construed fairly and as those of the party to whom they properly belong. *Beckwith* v. *Howard*, 6 R. I. 1. If there is any reasonable doubt as to the meaning of an exception, it is to be construed favorably for the lessee.

As to boundaries and descriptions of premises, the same rules are to be applied as in the case of deeds and other sealed instruments. See Vol. 2, tit. Deeds.

Ordinarily, a lease will commence on the day of its date, if no other time be fixed; but, if it has no date, or an impossible one, it will commence from delivery. *Keyes* v. *Dearborn*, 12 N. H. 52; *Trustees, etc.* v. *Robinson*, Wright (Ohio), 436. When time is to be computed *from* or *after* a certain day, that day is usually excluded. *Bigelow* v. *Willson*, 1 Pick. 485; *Arnold* v. *United States*, 9 Cranch, 104. The application of this rule to leases is not uniform, but the inclusion or exclusion of the day mentioned seems to be governed by the presumed intention of the parties, or the circumstances of the particular case. *White* v. *Nicholson*, 4 Scott (N. R.), 707; 4 M. & G. 95; *Pugh* v. *Duke of Leeds*, Cowp. 714; *Wilcox* v. *Wood*, 9 Wend. 346; *Blake* v. *Crowninshield*, 9 N. H. 304.

At common law, a lease limited by months was construed as meaning lunar months (2 Bl. Com. 141; *Parsons* v. *Chamberlin*, 4 Wend. 512); but by statute in some of the American States, and by usage in others, months are held to mean calendar months.

A lease for one year, and so on for two or three years, as the parties shall agree, does not become a lease for two or three years without a subsequent agreement, but after it has commenced running on the second year it is not determinable until that year is ended. *Harris* v. *Evans*, 1 Wils. 262. But one which is expressed to be "not for one year only, but from year to year," creates a tenancy for two years at least; and so does one for years generally without saying how many. If for an optional number of years, without stating at whose option, it is at the option of the lessee. *Dann* v. *Spurrier*, 3 B. & P. 399, 442; 7 Ves. 231; *Price* v. *Dyer*, 17 Ves. 363; *Webb* v. *Dixon*, 9 East, 16.

A power to revoke a lease at will gives the lessor power to revoke it at any time; but a proviso that the term shall cease on the failure of the lessee to pay rent, merely gives the lessor power to determine it on such failure. The lessee has no such option. *Ex parte Miller*, 2 Hill, 418; *Reid* v. *Parsons*, 2 Chit. 247.

A lease for a fixed term, but subject to be defeated by the happening of a particular event, is ended by the happening of that event. *Ludford* v. *Barber*, 1 Term, 86. An estate for life terminates at the death of him on whose life it depends. One for the lives of A. *and* B. terminates on the death of either, while one for the life of A. *or* B. continues so long as either of them lives. *Lord Vaux's case*, Cro. Eliz.

269; *Elliott* v. *Turner*, 2 C. B. 461. But a grant to two generally, *for their lives*, is sufficient to carry a right of survivorship.

§ 3. **Validity of a lease.** The requisites to the validity of a lease are, briefly, that it be made by a person having sufficient title or authority; that it be for a term properly defined; and that it be in compliance with and do not contravene any provision of law on the subject. One who has no estate or interest in lands cannot give a lease thereof which will bind the true owner. *Wilklow* v. *Lane*, 37 Barb. 244. Nor can any one whose interest is limited in time, give a valid lease to extend beyond that limit. *Robie* v. *Smith*, 21 Me. 114. But, *it seems*, a lease granted under a power, for more years than is authorized by such power, although void at law, will be held good in equity to the extent of the power. *Roe d. Brune* v. *Prideaux*, 10 East, 158; *Law* v. *Hempstead*, 10 Conn. 23; *Martin* v. *Sterling*, 1 Root, 210. And a lease by a tenant for life or years, extending beyond his term, will generally pass what interest he has.

A lease for the life of one not in existence does not sufficiently define the term, and is void; but one for the lives of several persons named is valid for the lives of such of them as are then living. *Doe d. Pemberton* v. *Edwards*, 1 M. & W. 553.

The question of the validity of leases arises most frequently under that provision of the statute of frauds requiring all conveyances of lands or of any interest therein to be in writing. Under these statutes it has been held that a grant of the possession of land for any permanent use, such as one to enter upon land at all times, or to erect and keep in repair a building, a canal, an embankment or the like, must be in writing; but a mere license to enter and do certain acts of a temporary character need not be, as it confers no interest in the land. *Cook* v. *Stearns*, 11 Mass. 533; *Miller* v. *Auburn & Sy. R. Co.*, 6 Hill, 61; *Mumford* v. *Whitney*, 15 Wend. 380. Even a permission to use a church edifice for the purposes of worship, when not occupied by the owners, conveys such an interest, and must be in writing. *Brumfield* v. *Carson*, 33 Ind. 94; 5 Am. Rep. 184. Where the lease itself is required to be in writing, a subsequent verbal agreement to add a restrictive clause is void (*Snelling* v. *Thomas*, 17 L. R. Eq. 303; 7 Eng. Rep. 829; 43 L. J. Ch. 506); but one to do some collateral thing relating to the demised premises is valid. *Mann* v. *Mann*, 43 L. J. C. P. 241; 30 L. T. (N. S.) 526; *Angell* v. *Duke*, 44 L. J. Q. B. 78; 10 L. R. Q. B. 174; 12 Eng. Rep. 236; 23 W. R. 307.

Leases for short terms, limited in England and in some of the American States to three years, and in other of those States to one year from the making thereof, are expressly excepted from the operation of the

statute of frauds. A verbal lease for the full term allowed by statute, to be valid, must commence immediately, otherwise it will extend beyond that limit. *Parker* v. *Hollis*, 50 Ala. 411; *Wheeler* v. *Frankenthal*, 78 Ill. 124. Such a lease for more than the statutory limit, although void as a lease, will create a tenancy from year to year, and one who takes and holds possession under it will be bound by its provisions. *Doe d. Rigge* v. *Bell*, 5 Term, 471; *Richardson* v. *Gifford*, 3 N. & M. 325; 1 A. & E. 52; *Beale* v. *Sanders*, 3 Bing. N. C. 850; 5 Scott, 58; 1 Jur. 1083; *Bradley* v. *Covel*, 4 Cow. 350. A parol permission to hold over from year to year is valid, when followed by the receipt of rent; but if without consideration, it is revocable. *Hammon* v. *Douglas*, 50 Mo. 434; *Walker* v. *Wilson*, 52 Ill. 352.

An alteration in a lease, whether material or not, if made by one claiming a benefit under it, avoids it so far as respects an action upon it. Otherwise, if made by a stranger.

A lease made for an illegal or immoral purpose has been held to be so tainted that it will not sustain an action. *Smith* v. *White*, 1 L. R. Eq. 626; 36 L. J. Ch. 454; 14 W. R. 510; 14 L. T. (N. S.) 350. Such leases are sometimes by statute expressly declared to be void. But, in order to avoid a lease on that ground, it must appear not merely that the lessor knew of the intent to use the premises for an unlawful purpose, but that he was a party to such intent or has done something in furtherance of it. *Updike* v. *Campbell*, 4 E. D. Smith (N. Y.), 570

Leases have also been held void when founded on a fraudulent, unjust, illegal or immoral consideration, such as usury, marriage brokage, and the like; but an underlessee, not concerned in such consideration, will not be affected thereby. *Molloy* v. *Irwin*, 1 Sch. & Lef. 310.

§ 4. **Renewal of lease.** A tenancy once established may be continued on the mutual consent of the parties, by the execution of a new, or, what is equivalent thereto, a renewal of the old one, at the expiration of each term for a further year or number of years. This continuance is frequently a matter of great importance to the tenant, but the landlord is under no legal obligation to grant it, unless he has expressly covenanted to do so. Imperfect rights of renewal, founded upon local custom, have sometimes been recognized and enforced in equity, but these are exceptions to the general rule. *Phyfe* v. *Wardell*, 5 Paige, 268. Covenants for renewal are, therefore, commonly inserted in leases for years. These will be hereafter considered in treating of covenants on the part of the lessor.

Leases sometimes provide for a continuance of the tenancy at the option of the lessee without any formal renewal. Such is the case of a

lease for a term of years, with the privilege of a specified number of years more if desired, which fixes the rent for the whole term, and requires notice of option before the end of the term first named. *House* v. *Burr*, 24 Barb. 525; *Chretien* v. *Doney*, 1 N. Y. (1 Comst.) 419. If a lessee under such an optional lease, who has covenanted to deliver up quiet possession at the end of his term, continues in possession afterward, he will be deemed to have elected the longer term. *Delashman* v. *Berry*, 20 Mich. 292; 4 Am. Rep. 392. And where no notice of option is required by the lease, such continuance in possession with payment of rent will operate to create a new term (*Schroeder* v. *Gemeinder*, 10 Nev. 355); otherwise, where notice of option is required. *Thiebaud* v. *First National Bank of Vevay*, 42 Ind. 212. The receipt of rent alone, and giving a general receipt therefor, cannot be construed into a letting for a new term. *Hartnack* v. *James*, 1 Penn. Leg. Gaz. 364.

Compliance on the part of the lessee with other conditions on which a renewal was to be granted has been held sometimes to operate of itself as a renewal. *Ranlet* v. *Cook*, 44 N. H. 512. If a lessee ends his term by proper notice and removes from the premises, no subsequent acts of his, which are not equivalent to a re-entry and exclusive possession, will operate as a renewal. *Thomas* v. *Frost*, 29 Mich. 336.

An indorsement on a lease by arbitrators, authorized by the covenant for renewal to fix the price, thus: "This lease is renewed by arbitration for five years, at a yearly rent of," etc., is a good renewal. *Brand* v. *Frumveller*, 32 Mich. 215.

A renewal procured by one joint tenant in his own favor, in fraud of his co-tenants, will inure to the benefit of all. *Burrell* v. *Bull*, 3 Sandf. Ch. 15.

The renewal of a lease, with a stipulation for the performance of certain work covenanted for in the former lease, will not operate as a waiver of damages for previous non-performance. *Walker* v. *Seymour*, 13 Mo. 592.

Where the original term of a lease for ninety-nine years, renewable forever, has expired, and the owner of the leasehold interest has failed to obtain a renewal within the term, according to the literal wording of the covenant for renewal, equity will relieve him, and compel the owner of the reversion to execute a new lease, provided the application be made in a reasonable time, and all arrearages of ground-rent and the renewal fine be first paid. *Banks* v. *Haskie*, 45 Md. 207.

ARTICLE VI.

COVENANTS AND CONDITIONS.

Section 1. In general. The rights and liabilities of the parties to a lease depend very much upon covenants and conditions, either inserted in express terms or incident to the relation between them, and, therefore, to be implied. Of the nature, general character, construction and validity of covenants, and the parties bound by or entitled to the benefit of them, and of the performance or breach thereof, sufficient has already been said under the title "Covenants" (Vol. 2, p. 363), and this article will be confined to the consideration of the particular covenants and conditions found in leases.

Though classed together, and frequently created by the same form of words, there is an important distinction between covenants and conditions. The former are promises to do or not to do certain things, while the latter are qualifications annexed to the estate of the lessee, whereby it may be defeated or avoided. Conditions are either in deed or in law. The breach of a condition in deed entitles the lessor or reversioner to enter and determine the estate, but does not defeat it until entry. Conditions in law, now generally called limitations, mark the period which is to terminate a tenancy without entry or claim.

Words in the form of a condition may be construed to be a covenant, and will be so construed where there is doubt; but words importing a covenant, if intended to operate as a condition, are always express to that point. *Surplice* v. *Farnsworth*, 7 M. & G. 576, 584.

If a condition is precedent, it must be performed before the term can commence or the right accrue, and, therefore, if it be impossible, the estate never vests. If subsequent, that is, to be performed after the estate has vested, the non-performance of it will operate either to enlarge or defeat such estate according to its terms. In order to determine whether a condition is precedent or subsequent, the intention of the parties is to be sought; no particular form of words being required to make it one or the other.

The terms "upon condition," or "provided that," are usually employed to express a condition. The word "proviso" in a lease usually implies a condition, but if a penalty is annexed, it becomes a covenant. But no condition is created by the words "yielding and rendering," unless to construe them otherwise would leave the landlord without remedy in case of the non-payment of rent; nor do words in restraint of the grant, or words of an uncertain character, have that effect. Comyn's Dig., Condition.

Any condition not illegal or inconsistent with the estate granted may be annexed to it by the lessor at the time of the grant, but not afterward; and it may be annexed by the same instrument which creates the estate, or by another executed at the same time.

If a condition subsequent is impossible, illegal, or repugnant to the nature of the estate granted, it is void and the estate becomes absolute, and is not divested by the non-performance of the condition.

As has already been stated (*ante*, 212, Art. 3, § 3), the payment of rent or the performance of any covenant running with the land, may be provided for by a condition for a re-entry and forfeiture in case of a breach. The mere breach of a covenant does not give such a right of re-entry, unless it has been expressly reserved. *Dennison* v. *Reed*, 3 Dana, 586; *Brown* v. *Bragg*, 22 Ind. 122.

A condition that the lessee shall not do some particular act without the leave of the lessor has been held to be entire, and an express leave to do it once given by the landlord has been held to satisfy the condition forever. *Dickey* v. *McCullough*, 2 Watts & S. 88; *McKildoe* v. *Darracott*, 13 Gratt. 278; *Dakin* v. *Williams*, 17 Wend. 447.

§ 2. **Particular covenants by lessor.** "Usual covenants," within the meaning of a stipulation to insert them in a lease, are such as are incident to the nature of the contract, and which may be exacted independent of positive stipulation. *Wilkins* v. *Fry*, 1 Meriv. 263; 2 Swanst. 249. Among these is the landlord's covenant for quiet enjoyment by the tenant. This, if not inserted, is still implied in every lease. *Bandy* v. *Cartwright*, 8 Exch. 913; 22 L. J. Exch. 285; *Maule* v. *Ashmead*, 20 Penn. St. 482; *Barney* v. *Keith*, 4 Wend. 502; *Mack* v. *Patchin*, 42 N. Y. (3 Hand) 167; 1 Am. Rep. 506; *Eldred* v. *Leahy*, 31 Wis. 546; *Berrington* v. *Casey*, 78 Ill. 317. Its meaning is merely that the tenant's possession shall not be disturbed by acts of the landlord, or of persons claiming under or through him, or persons having paramount title. It implies no warranty against mere trespassers. *Coddington* v. *Dunham*, 3 J. & Sp. (N. Y.) 412; S. C., 45 How. 40; *Baugher* v. *Wilkins*, 16 Md. 35; *Playter* v. *Cunningham*, 21 Cal. 229; *Surget* v. *Arighi*, 11 S. & M. 87. It extends to possession only, and is broken only by an entry and expulsion, or by an actual disturbance of the possession. *Whitbeck* v. *Cook*, 15 Johns. 483; *Grist* v. *Hodges*, 3 Dev. (N. C.) 200.

An eviction, to be a breach of this covenant, must be by title paramount, but need not be by suit; yet, if the tenant surrenders without contest, he assumes the burden of proving that the claimant had a paramount title. *Greenvault* v. *Davis*, 4 Hill, 643; *Cowan* v. *Silliman*, 4 Dev. (N. C.) 46; *Hamilton* v. *Cutts*, 4 Mass. 349. It must also

occur after the lessee has taken possession, actual or constructive, and before suit brought. *St. John* v. *Palmer*, 5 Hill, 599.

A mere prohibition to pay the rent to the lessor is not an eviction; nor is an interruption or prevention of possession by a wrong-doer; nor a mere personal wrong not affecting the estate. *Ellis* v. *Welch*, 6 Mass. 246. A destruction of the premises by fire is not an eviction, unless the landlord has expressly agreed to rebuild or keep in repair. *Brown* v. *Quilter*, Ambl. 621.

As the covenant extends to the free use of the whole of the premises, an ouster from any material part thereof may be treated by the lessee as an eviction from the whole. *Etheridge* v. *Osborn*, 12 Wend. 529; *Morris* v. *Edgington*, 3 Taunt. 24.

Acts of gross moral turpitude on the part of the landlord, creating a nuisance, causing disturbance to his tenants, or making the premises no longer respectable for moral or decent people to reside there, also constitute an eviction. *Dyett* v. *Pendleton*, 8 Cow. 727.

The covenant for quiet enjoyment is held to imply a warranty of sufficient title or right to make a valid lease; and it is broken if the lessee is prevented from entering by a person who had title at the date of the lease. *Stott* v. *Rutherford*, 92 U. S. (2 Otto) 107; *Grannis* v. *Clark*, 8 Cow. 36. But see *Gano* v. *Vanderveer*, 34 N. J. Law, 293.

An express covenant for quiet enjoyment runs with the land, and binds and inures to the benefit of the assignees of the respective parties. *Campbell* v. *Lewis*, 3 B. & Ald. 392; *Shelton* v. *Codman*, 3 Cush. 318. Where there is such an express covenant, none other of the same character will be implied. *Burr* v. *Stenton*, 43 N. Y. (4 Hand) 462.

There is no implied covenant in a lease of a salt well that it is of any particular productive capacity (*Clark* v. *Babcock*, 23 Mich. 164); or in a lease of a dwelling that it is reasonably fit for habitation (*Foster* v. *Peyser*, 9 Cush. 242); or in a lease of a store, warehouse, or other building for a particular use, that it is suitable for that use, or is safe and well built. *Dutton* v. *Gerrish*, 9 Cush. 89; *McGlashan* v. *Tallmadge*, 37 Barb. 313; *Jaffe* v. *Harteau*, 56 N. Y. (11 Sick.) 398; S. C., 15 Am. Rep. 438; *Libbey* v. *Tolford*, 48 Me. 316. A landlord may however, bind himself by parol to put a house in tenantable repair. *Mann* v. *Nunn*, 30 L. T. (N. S.) 526; 43 L. J. C. P. 241.

At common law, the landlord was not bound to repair, unless he expressly covenanted to do so; and a covenant by him to rebuild, in case of the destruction of the premises by fire, or if he does not do so, to remit the rent, cannot be implied, nor can it be demanded as a usual covenant. He may, however, bind not only himself but the

reversioner, by an express covenant, to make such repairs. *Allen* v. *Culver*, 3 Denio, 284. To enable a lessee to sue for a breach of the covenant to repair, he must have given previous notice to repair. *Makin* v. *Watkinson*, 6 L. J. Exch. 25; 40 id. 33; 19 W. R. 286.

A landlord's covenant to make "all necessary repairs" binds him merely to restore the premises to their original condition as to fitness for the business for which they were rented (*Ward* v. *Kelsey*, 38 N. Y. [11 Tiff.] 80); and his covenant to keep them in repair has reference only to their condition for profitable use, and does not make him liable for accidental injuries to the lessee or others arising from their being out of repair. *Flynn* v. *Hatton*, 45 How. Pr. 333; S. C., 4 Daly, 552.

A covenant on the part of the landlord to indemnify the tenant against incumbrances is sometimes inserted in leases for years, and is important to protect the latter from loss by being turned out of possession during his term by some prior incumbrancer, for which he would otherwise have no redress against his landlord. Such a covenant is technically broken by the mere existence of an outstanding incumbrance which may defeat the leasehold estate. *Potter* v. *Taylor*, 6 Vt. 676.

A mortgage, a right of way or a public highway over the premises, a previous contract for a sale of part of the premises, and an inchoate right of dower, have each been held to come within such a covenant; and so, in the case of an underlease, has rent in arrear for which the landlord has a right of re-entry. *Bean* v. *Mayo*, 5 Greenl. 94; *Chapman* v. *Holmes*, 5 Halst. 28; *Harlow* v. *Thomas*, 15 Pick. 66; *Seitzinger* v. *Weaver*, 1 Rawle, 382; *Porter* v. *Noyes*, 2 Greenl. 22; *Stevenson* v. *Powell*, 1 Bulst. 128; *Partridge* v. *Sowerby*, 3 B. & P. 172.

A covenant for further assurance is sometimes inserted in a lease; and this will give the tenant the right to require that defects in the landlord's title be removed, so far as practicable, and that he be put in possession as against a wrongful occupant. *Coe* v. *Clay*, 5 Bing. 440.

As has already been stated, a covenant for the renewal of his lease is essential to insure to the tenant a continuance of his tenancy beyond the current term; and such a covenant will avail him as well against the grantees of the whole or portions of the demised premises as against the landlord himself. *Norton* v. *Snyder*, 2 Hun (N. Y.), 82; S. C., 4 N. Y. Sup. (T. & C.) 330. This covenant may limit the number of renewals, or may leave that number at the option of the lessee. Covenants for continued renewals, however, are not favored, because they tend to create perpetuities, which are generally deemed contrary to

public policy, and in some States are expressly prohibited by statute; yet, where valid and clearly expressed, they will be specifically enforced. *Iggulden* v. *May*, 9 Ves. 325; 7 East, 237; *Willan* v. *Willan*, 16 Ves. 84; *Blackmore* v. *Boardman*, 28 Mo. 420.

The covenant may also be either unconditional or conditioned upon the performance of certain covenants, or the payment of some fine or bonus. *Copper Mining Co.* v. *Beach*, 13 Beav. 478. Such performance or payment is then a condition precedent to the right of renewal. *Job* v. *Banister*, 39 Eng. L. & Eq. 599. But now payment of rent is no excuse for not renewing when the covenant is independent. *Tracy* v. *Albany Exch. Co.*, 7 N. Y. (3 Seld.) 472.

To be valid, a covenant for renewal must be reasonably definite and certain, both as to term and amount of rent. *Abeel* v. *Radcliff*, 13 Johns. 297; *Cunningham* v. *Pattee*, 99 Mass. 248; *Pray* v. *Clark* 113 id. 283; *Arnot* v. *Alexander*, 44 Mo. 25. A proviso that this lease shall be renewed at the pleasure of the lessees implies at least one renewal on the original conditions, but not a perpetual renewal. *Creighton* v. *McKee*, 7 Phil. (Penn.) 324; *Carr* v. *Ellison*, 20 Wend. 178; *Piggot* v. *Mason*, 1 Paige, 412. The word "renew," in itself, imports the giving of a new lease on the same terms as the old one, unless the contrary otherwise appears (*Brown* v. *Parsons*, 22 Mich. 24); but it does not necessarily imply that it shall contain all the covenants of the former, at least not those which are accidental and non-essential, such as covenants to build, to pay for buildings, to renew, and the like. *Rutgers* v. *Hunter*, 6 Johns Ch. 215; *Willis* v. *Astor*, 4 Edw. Ch. 595.

A covenant that the lessee shall, at the expiration of his lease, have the refusal for three years longer, binds the lessor to renew at the same rent; and the acceptance by the lessee of a new lease at an increased rent is not a waiver of his right. *Tracy* v. *Albany Exch. Co.*, 7 N. Y. (3 Seld.) 472. A covenant to renew at the option or request of the lessee, requires him to make his election and give notice of it before the expiration of his current term. *Renoud* v. *Daskam*, 34 Conn. 512; *Thiebaud* v. *Nat. Bank of Vevay*, 42 Ind. 212. A notice of option sent by mail to the address of the lessor as given by him, on the day before that on which the lease required it to be given, is sufficient though not received by him until several days afterward. *Reed* v. *St. John* 2 Daly (N. Y.), 213. A covenant to renew if the lessor "does not dispose of the premises" is discharged upon a conveyance thereof to the vendor's son, by way of advancement. *Elston* v. *Schilling*, 42 N. Y. (3 Hand) 79.

In the absence of express agreement, the landlord is not bound to

pay for improvements made by the tenant during his term; but covenants to that effect are frequently inserted in leases. A covenant in the alternative, to renew or pay for buildings erected by the lessee, upon an appraisement, makes the appraisement, when had, final between the parties. *Van Cortlandt* v. *Underhill*, 17 Johns. 405. Under such a covenant, the lessee has no option, but he is bound to accept a renewal if tendered, and upon his refusal to do so, the lessor is entitled to recover possession immediately without paying for the buildings. *Rutgers* v. *Hunter*, 6 Johns. Ch. 215; *Pearce* v. *Colden*, 8 Barb. 522. Under a provision that the lessor shall not take possession until he has given thirty days' notice and paid the value of improvements, which value was to be appraised, he is entitled to possession after notice and tender of the value of the improvements, if the lessee fails to appoint an appraiser on his part (*Connor* v. *Jones*, 28 Cal. 59); but, under a provision that the lessee on being removed or dispossessed shall be paid for his improvements, and on such payment shall yield up possession, he is entitled to retain possession until paid for them, even though his term has expired. *Van Rensselaer* v. *Penniman*, 6 Wend. 569. If the lease prescribes the character of the buildings, the lessee can claim pay for only such as are of that character, in the absence of fraud or waiver. *Pike* v. *Butler*, 4 N. Y. (4 Comst.) 360; *Fisher* v. *Fisher*, 1 Bradf. (N. Y.) 335.

A covenant is sometimes inserted in leases, that the lessor will convey the premises to the lessee at the end of the term, on payment of a specified sum; or in the alternative, to pay for the improvements or sell at an appraised value. Such a covenant is good, and may be enforced; but it is indivisible, and all parties interested must join to enforce it. *Ostrander* v. *Livingston*, 3 Barb. Ch. 416.

The law usually imposes on the landlord the duty of paying all taxes and assessments upon the premises, and he can shift the burden upon the tenant only by express agreement; but, as a general rule, the tenant may pay them and deduct them from the rent, or collect them back from the landlord. *Jones* v. *Morris*, 3 Exch. 742; *Dawson* v. *Linton*, 5 B. & Ald. 521.

§ 3. **Particular covenants by lessee.** In all leases there are implied covenants on the part of the lessee to pay rent, to make tenantable repairs, to use the premises in a proper tenant-like manner, without exposing them to ruin or waste by acts of omission or commission, and not to put them to a use materially different from that to which they have usually been applied. *Lynch* v. *Onondaga Salt Co.*, 64 Barb. 558; *Nave* v. *Berry*, 22 Ala. 382. But a covenant not to use for any

other purpose will not be implied from such words as, "to be used as cabinet ware rooms." *Brugman* v. *Noyes*, 6 Wis. 1.

An agreement that the "usual and ordinary covenants" shall be inserted in a lease, does not entitle the landlord to insert therein a covenant, that the lessee shall personally occupy or cultivate the premises (*Clark* v. *Clark*, 49 Cal. 586); or, that he will keep them insured, or pay the taxes (*Bennett* v. *Womack*, 7 Bar. & Cr. 627); or, that he will not assign or underlet without permission (*Church* v. *Brown*, 15 Ves. 258); or, that he will not carry on a particular trade or business on the premises (*Van* v. *Corpe*, 3 My. & K. 269; *Propert* v. *Parker*, id. 280); nor, in a mining lease, a proviso for re-entry on breach of any other covenants except that for non-payment of rent. *Hodgkinson* v. *Crowe*, 44 L. J. Chan. 680; 10 L.R. Ch. 622; 14 Eng. Rep. 823; 23 W.R. 885.

A provision that, on failure to perform certain covenants, the lease shall be forfeited, does not apply to a subsequent independent covenant. *Burnes* v. *McCubbin*, 3 Kans. 221.

The covenant implied in respect to rent, when none is expressed, is, that the lessee shall pay the reasonable worth of the use of the premises so long as he continues to hold them. As the lessee may at any time discharge himself from further payment of rent under this implied covenant by assigning his lease to anybody, even to an insolvent, the lessor is safer with an express covenant, and one is usually inserted in addition to the words of reservation, thus binding the lessee, his executors and assigns, to pay rent until the expiration of the lease.

A covenant to pay rent need not be in direct terms. Thus, the words "yielding and paying rent," in an indenture signed by the lessee, will raise such a covenant; but the words, "subject to the payment of the rent reserved," in an assignment of a lease, are not sufficient. *Wolveridge* v. *Steward*, 3 M. & Scott, 561; 1 C. & M. 644; 3 Tyr. 687; *Iggulden* v. *May*, 9 Ves. 330; 7 East, 237.

The time for the payment of rent is fixed sometimes by the custom of the country or place where the premises are located, but usually by the express terms of the lease; and if not fixed in either of those ways it is not due until the end of the term. It may be made payable in advance, at any stated periods; but a custom to pay in advance cannot be imported into an express covenant to pay quarterly. *Mitchell* v. *Weller*, 1 Jur. 622. A covenant to "pay as rent the sum of $40 per month for and during the term," followed by a provision for forfeiture for non-payment, requires the payment to be made monthly. *Gibbens* v. *Thompson*, 21 Minn. 398. Where rent is to be paid in produce, no time being fixed, it is payable in a reasonable time after crops are gathered. *Toler* v. *Seabrook*, 39 Ga. 14; *Brown* v. *Adams*, 35 Tex. 447.

The lessee has the whole of the last day specified for payment in which to make it, but sunset of that day is the time for the lessor to demand it in order to take advantage of a condition for re-entry. If not paid when due, interest may be recovered on it.

If no place for the payment of rent is specified, a valid tender of it may be made upon the demised premises, or to the landlord in person anywhere.

The covenant for the payment of rent will be suspended by an eviction of the lessee, either actual or constructive, for so long as it continues, even though the obstacles to re-entry are removed. *Cibil* v. *Hill*, 1 Leon. 110. And this is true as to the whole rent, when the lessee is deprived of the enjoyment of any part of the premises by the agency of the lessor. *Bennet* v. *Bittle*, 4 Rawle, 339; *Dalston* v. *Reeve*, 1 Ld. Raym. 77. See Eviction.

The covenant will be discharged if the tenant quits the premises, being lawfully entitled to do so, or if the landlord accepts another tenant. But the untenantable condition of the premises, or their total destruction by unavoidable accident of fire, flood or tempest, will not, as a general rule, relieve the tenant from paying rent for the whole term. *Hallett* v. *Wylie*, 3 Johns. 44; *Linn* v. *Ross*, 10 Ohio, 412; *Fowler* v. *Bott*, 6 Mass. 63; *Gibson* v. *Perry*, 29 Mo. 245; *Proctor* v. *Keith*, 12 B. Monr. 252; *Baker* v. *Holtpzaffell*, 4 Taunt. 45. This liability has been modified by statute in several of the American States; and it may always be avoided by inserting a saving clause in the lease. A mere exception of casualties by fire in the covenant to repair is not, however, sufficient to relieve the tenant in such a case. *Balfour* v. *Weston*, 1 Term, 310; *Beach* v. *Farish*, 4 Cal. 339.

Although a tenant is impliedly bound to treat the demised premises in such a manner that no substantial injury shall happen to them, and to make tenantable repairs, yet he is not bound to rebuild when they have accidentally become ruinous or are destroyed, unless by express agreement. *Anworth* v. *Johnson*, 5 Car. & P. 239; *Cheetham* v. *Hampson*, 4 Term, 318; *White* v. *Nicholson*, 4 Scott N. R. 707; 4 M. & G. 95; *Bullock* v. *Dommitt*, 6 Term, 650.

The liability of a tenant to repair is not usually left to implication, but the fact and the extent of such liability are fixed by express covenant; and where there is an express covenant, none will be implied. This express covenant may be conditional. Where it follows such words as, "the same being first put in repair by the lessor," those words constitute a condition precedent. *Neale* v. *Ratcliffe*, 15 Q. B. 916; 15 Jur. 166; *Cannock* v. *Jones*, 3 Exch. 233; 18 L. J. Exch. 204; *Counter* v. *McPherson*, 5 Moore's P. C. C. 83.

A general covenant to repair only binds the lessee to see that the tenement does not suffer more injury than the usual operations of nature will cause to a building of its age and condition. *Stanley* v. *Towgood*, 3 Bing. N. C. 4; 3 Scott, 313; *Gutteridge* v. *Munyard*, 7 C. & P. 129; 1 M. & Rob. 334. It extends to all buildings erected during the term, as well as those originally demised. *Douse* v. *Earle*, 3 Lev. 264; 2 Vent. 126, 127. It also runs with the land and binds the assignee of the lease; and it binds the lessee holding under it even though the lease be void.

A covenant to make all necessary repairs binds the lessee to make them, from whatever cause they become necessary. *Lockrow* v. *Horgan*, 58 N Y. (13 Sick.) 635. One to uphold and repair premises binds him to make good all losses, even those caused by fire, tempest or lightning, and, consequently, to rebuild in case the buildings are destroyed by those causes. *Monk* v. *Noyes*, 1 C. & P. 265; *Beach* v. *Crain*, 2 N. Y. (2 Comst.) 86. One to keep the buildings in repair and to surrender them in such repair at the end of the term, creates the same liability; and that is not affected by the qualification "natural wear and tear excepted." *Abby* v. *Billups*, 35 Miss. 618; *Schmidt* v. *Pettit*, 1 McArth. 179; *McIntosh* v. *Lown*, 49 Barb. 550.

A covenant, by one who takes premises when out of repair, to put them in habitable repair, binds him to put them in better repair than he found them. *Belcher* v. *McIntosh*, 8 C. & P. 720. A covenant to substantially repair or uphold the premises, does not require them to be renewed in an improved or more durable manner (*Soward* v. *Leggatt*, 7 C. & P. 612); and one to put them in perfectly good repair requires no more than that they be put in as good a condition as they can be without change of form or material. *Ardesco Oil Co.* v. *Richardson*, 63 Penn. St. 162. A covenant to deliver up the premises in good order and condition binds the lessee to put the premises in such repair, their age and class being considered, though he did not find them so. *Payne* v. *Haine*, 16 M. & W. 541; 16 L. J. Exch. 130. But it does not bind him to rebuild. *Nave* v. *Berry*, 22 Ala. 382. Nor does a covenant to surrender buildings in the same condition as at the date of the lease, natural wear and tear excepted, without any covenant to that effect. *Warner* v. *Hitchins*, 5 Barb. 666. An exception in a covenant to repair, of damages by the elements or the acts of Providence, does not include damages to which human agency in any way contributed. *Polack* v. *Pioche*, 35 Cal. 416.

On the part of a farming tenant, there is an implied covenant to treat the farm in a husbandlike manner, to keep the fences in repair, and to cultivate according to the custom of the country; but there is none to

repair generally, or to spend money for manure. *Powley* v. *Walker*, 5 Term R. 373; *Brown* v. *Crump*, 1 Marsh 567. And see *Miller* v. *Shields*, 55 Ind. 71. Such tenant is under the same obligation as other tenants to repair the dwelling-house, but cannot be required to repair the outbuildings, unless by agreement or the custom of the country. He is also bound to preserve the timber and ornamental trees. *Herne* v. *Bembow*, 4 Taunt. 764. A covenant to keep and leave a farm and buildings in good repair does not require them to be put or left in better repair than they were at the date of the covenant. *West* v. *Hart*, 7 J. J. Marsh. 258.

If there be two covenants, a general one to keep premises in repair, with a clause for re-entry in case of breach, and a further covenant to repair in a specified time after notice, the first covenant is not restrained in its operation by the second. *Roe d. Goatly* v. *Paine*, 2 Camp. 520; 4 B. & C. 606. A covenant to leave in repair, and one to repair on notice, are also independent and do not qualify each other. *Wood* v. *Day*, 7 Taunt. 646. But a covenant to repair at all times, as often as needed, and at furthest within three months after notice, is held entire, and the last part qualifies the first. *Horsefall* v. *Testar*, 1 Moore, 89; 7 Taunt. 385.

A covenant to repair at a specified time is to be construed reasonably, and if repairs within the time covenanted be rendered impossible by the act of God, they must be made within a reasonable time afterward during the term.

A covenant to keep in repair is broken, so as to be a ground of action, whenever, during the term, the covenantor fails to make necessary repairs within a reasonable time; but covenants to leave in good repair cannot be broken until the end of the term. *Luxmore* v. *Robson*, 1 B. & Ald. 585; *Schieffelin* v. *Carpenter*, 15 Wend. 400. A covenant by an undertenant to repair after notice, is not broken by not complying with a notice from the superior landlord. *Williams* v. *Williams*, 30 L. T. (N. S.) 638.

A covenant to keep in the same state as when taken is excused by the act of God, rendering performance impossible, as by trees being blown down; but that does not excuse as to buildings. *Main's Case*, 5 Co. 21 *a*; *Brecknock Co.* v. *Pritchard*, 6 Term, 750. Nor is the covenant excused by the fact that the breach is caused by the act of a stranger. *Cook* v. *Champlain Trans. Co.*, 1 Denio, 91. Eviction by an elder title will absolve from this covenant. *Andrews* v. *Needham*, Noy, 75; Cro. Eliz. 656. In case of an assignment of the reversion to different parties, this covenant may be apportioned among such

assignees. *Badeley* v. *Vigurs*, 4 E. & B. 71; 1 Jur. (N. S.) 159; 23 L. J. Q. B. 377.

Without special agreement a lessee is under no obligation to his lessor to pay the taxes on the demised premises; yet as a general rule he is liable to the public therefor, and if he does pay them, he may deduct them from the rent, and hold his lessor for the repayment of any excess. *Tinckler* v. *Prentice*, 4 Taunt. 549; *Sapsford* v. *Fletcher*, 4 Term, 511; *Taylor* v. *Zamira*, 2 Marsh. 220; 6 Taunt. 524; *Garner* v. *Hannah*, 6 Duer, 262. He may, however, bind himself by a covenant to pay all or any part of the taxes, assessments, or other charges on the property; and such covenant will be valid, though neither the particular tax, nor the person to whom it is to be paid, is specified. *Trinity Church* v. *Higgins*, 48 N. Y. (3 Sick.) 532.

In construing this covenant, the tenant's liability must not be extended beyond the reasonable meaning of the terms employed. *Jeffrey* v. *Neale*, 6 L. R. C. P. 240; 40 L. J. C. P. 191; 24 L. T. (N. S.) 362; *Bolling* v. *Stokes*, 2 Leigh, 178; *Twycross* v. *Fitchburg R. R. Co.*, 10 Gray, 293; *Codman* v. *Johnson*, 104 Mass. 491; *Shepardson* v. *Elmore*, 19 Wis. 424; *Love* v. *Howard*, 6 R. I. 116.

A covenant to pay all taxes binds a lessee of a part of premises, which are assessed as a whole, to pay his proportionate share. *Wall* v. *Hinds*, 4 Gray, 256. The termination of his lease, by the destruction of the building after he has paid the taxes, does not entitle the lessee to a return of the sum paid (*Wood* v. *Bogle*, 115 Mass. 30); nor will a sale of the premises by the lessor after the lease has been so terminated relieve him from paying (*Paul* v. *Chickering*, 117 Mass. 265); nor will the dispossession of the tenant by summary proceedings have that effect. *Johnson* v. *Oppenheim*, 55 N.Y. (10 (Sick.) 280.

A lessee's covenant to pay taxes runs with the land, and will bind an assignee of the term. *Post* v. *Kearney*, 2 N. Y. (2 Comst.) 394. And the same is true of a covenant to pay all costs, charges and expenses except taxes. *Torrey* v. *Wallis*, 3 Cush. 442.

A covenant by the lessee to insure and to keep insured the demised premises in a certain sum, and, in case of fire, to apply the insurance money in rebuilding or repairing the premises, is frequently inserted in leases. Such a covenant does not limit the liability of the lessee under a covenant to repair, to the amount agreed to be insured (*Digby* v. *Atkinson*, 4 Camp. 275); nor does it give the lessor a right to receive the insurance money; but he, or his assignee of the reversion, can compel its application to the reinstatement of the buildings, or sue for its breach. A covenant to keep the premises insured is broken

by a failure to keep them so for any time, however short, and the lessor can take advantage of such breach by suit or re-entry. *Doe d. Flower* v. *Peck*, 1 B. & Ad. 428.

Unless restrained by covenant, a lessee has a right to assign his lease, or to underlet. *Church* v. *Brown*, 15 Ves. 264. Leases, therefore, usually contain covenants on the part of the lessee not to assign or underlet without the consent of the lessor; but this restriction is not favored in law, and is to be very strictly construed, and nothing short of an actual and voluntary transfer of the lessee's interest will ordinarily be considered a breach of the covenant against assignment. *Hargrave* v. *King*, 5 Ired. Eq. 430; *Collins* v. *Hasbrouck*, 56 N. Y. (11 Sick.) 157; 15 Am. Rep. 407; *Moore* v. *Pitts*, 53 N. Y. (8 Sick.) 85. A deposit of the lease as security, an advertising of it for sale, or an underletting, are not breaches of such covenant. *Doe d. Goodbehere* v. *Bevan*, 3 M. & S. 353; *Doe d. Pitt* v. *Hogg*, 4 D. & R. 225. But a covenant "not to set, let or assign over the premises, or any part thereof," is broken by an underletting. *Doe d. Holland* v. *Worsley*, Camp. 20. A covenant not to assign without consent, "such covenant not being arbitrarily withheld," is binding where the refusal is upon advice and not arbitrary. *Treloar* v. *Bigge*, 9 L. R. Exch. 151; 9 Eng. Rep. 464; 22 W. R. 843; 43 L. J. Exch. 95.

The covenant may be not to assign to a particular person, and then it is construed to mean a direct assignment to him, or one made to a third party with intent that a re-assignment shall be made to him. A covenant by a lessee, that he, his executors or administrators shall not assign, does not bind his assignee (*Paul* v. *Nurse*, 2 M. & R. 525; 8 B. & C. 486); nor does it prevent his executors from disposing of a lease for years as assets. *Seers* v. *Hind*, 1 Ves. 295.

A covenant not to assign without consent is waived forever by one license to assign. *Murray* v. *Harway*, 56 N. Y. (11 Sick.) 337; *Chipman* v. *Emeric*, 5 Cal. 49. In this respect it differs from a covenant not to underlet, a waiver of one breach of that covenant not operating as a waiver of another distinct breach thereof. *Seaver* v. *Coburn*, 10 Cush. 324.

An assignment of the term is not a breach of the covenant not to underlet. *Lynde* v. *Hough*, 27 Barb. 415; *Den d. Bockover* v. *Post*, 1 Dutch. 285. Nor is the taking in a lodger a breach, although he has the exclusive possession of a room. *Doe d. Pitt* v. *Laming*, 4 Camp. 77; 1 R. & M. 36. If the lease reserves a heavy rent, very strong ground for refusing consent must be shown, in order to take advantage of a breach of the covenant. *Sheppard* v. *Hong Kong, etc., Banking Co.*, 20 W. R. 459.

A covenant that the lessee and his assigns shall reside on the premises, sometimes found in leases, is broken by the lessee's abandoning the premises, or by his doing any act which renders his residence there impossible, as by suffering them to be taken and sold to satisfy a judgment confessed by him, or by their being taken by his assignee in bankruptcy. *Doe d. Norfolk* v. *Hawke*, 2 East, 481; *Doe d. Lockwood* v. *Clark*, 8 id. 185.

A covenant not to suffer or permit more than one person to every hundred acres to reside on, use or occupy any part of the premises, is broken if the lessee lets portions to cultivate on shares in the proportion of more than one to one hundred acres (*Jackson* v. *Rich*, 7 Johns. 194); but not by suffering two to occupy where the whole is between one and two hundred acres. *Jackson* v. *Agan*, 1 Johns. 273.

A covenant to build on the premises after a prescribed pattern is valid, and will be enforced. *Franklyn* v. *Tuton*, 5 Madd. 469. But where a uniform plan is prescribed for the benefit of all the tenants of a tract of land rented in parcels, all will be released if the covenant is dispensed with as to one. *Roper* v. *Williams*, Turn. & Russ. 18. A covenant not to build on the premises any building which should in whole or in part be occupied as a dwelling, is broken by erecting an addition to a house already there, and to be occupied in connection with it. *Domville* v. *Colville*, 7 Ir. C. L. 68.

A covenant not to carry on a particular trade upon the premises, if not unreasonably in restraint of trade, is valid and will be enforced against either the lessee or his assignee. *Holbrook* v. *Waters*, 9 How. (N. Y.) 335; *Dunlop* v. *Gregory*, 10 N. Y. (6 Seld.) 241; *Howard* v. *Ellis*, 4 Sandf. 369. Covenants of that character are to be somewhat strictly construed, and not to be extended beyond the express terms employed, or the manifest intent of the parties. *Simons* v. *Farren*, 1 Bing. N. C. 126; 4 M. & Scott, 672; *Cooke* v. *Colcraft*, 2 W. Bl. 856; 3 Wils. 380. The opening of a school or a dancing academy upon premises has been held a breach of a covenant not to carry on or permit another to carry on any trade or business there. *Wickenden* v. *Webster*, 6 E. & B. 387; 2 Jur. (N. S.) 590; 25 L. J. Q. B. 264; *Doe d. Bish* v. *Keeling*, 1 M. & S. 95; *Kemp* v. *Sober*, 1 Sim. (N. S.) 517; 15 Jus. 458; 20 L. J. Ch. 602.

In construing covenants against the exercise of offensive trades, the situation of the premises in relation to other buildings is to be taken into consideration; and generally the trade complained of must be shown to be offensive or within the meaning of the covenant. *Jones* v. *Thorne*, 1 B. & C. 715; 3 D. & R. 152; *Pease* v. *Coates*, 12 Jur. (N. S.) 684; 14 W. R. 1021; 14 L. T. (N. S.) 886; *Gutteridge* v. *Munyard*, 7 C. & P. 129; 1 M. & R. 334. Where a lessor inserts the same cov-

enants against offensive trades in leases of several adjoining lots, they are to be deemed for the mutual benefit and protection of all the lessees. *Barron* v. *Richard*, 3 Edw. Ch. (N. Y.) 96.

The breach of a covenant not to exercise a trade on the demised premises may be waived by the lessors permitting the tenant to expend money in adapting them to such trade, but not by his mere inaction for six years; nor will his permission to exercise one trade authorize the tenant to carry on another. *Doe d. Sheppard* v. *Allen*, 3 Taunt. 78; *Macher* v. *Foundling Hospital*, 1 Ves. & B. 188.

In a lease, or an informal agreement for the use of a farm, there is an implied covenant by the tenant to manage it in a husbandlike manner. *Powley* v. *Walker*, 5 Term, 373; *Tempest* v. *Rawling*, 13 East, 18. But express covenants on the subject are usually inserted. Where these vary from the custom of the country they exclude and supersede such custom; but where they are not inconsistent with it, the custom is to be deemed a part of the contract. *Hutton* v. *Warren*, 1 Mees. & W. 466; *Senior* v. *Armytage*, Holt, 197; *Muncey* v. *Dennis*, 1 H. & N. 216. A covenant by a farming lessee to furnish seed binds him to furnish good seed. *Flick* v. *Wetherbee*, 20 Wis. 392.

Covenants to surrender the premises, and whatever was leased with them, at the end of the term or upon a specified notice, are frequently inserted in leases. When such a covenant in terms includes "improvements," as it sometimes does, that word will embrace not merely fixtures, but every addition, alteration, erection or annexation, made by the tenant to render the premises more profitable, useful or convenient to him. *French* v. *Mayor, &c., of N. Y.*, 16 How. (N. Y.) 220. But see *Coster* v. *Peters*, 7 Robt. (N. Y.) 620.

Where by the terms of a lease of lands, for a term to commence at a specified time in the future, the lessor binds himself to make certain stipulated improvements or repairs upon such lands, prior to the time when possession is to be given and such term to commence, the lessee may refuse to accept possession thereof, if at such date such repairs or improvements shall not have been made. *Hickman* v. *Rayl*, 55 Ind. 551.

ARTICLE VII.

ASSIGNMENT OR TRANSFER OF LEASE.

Section 1. In general. By the assignment of a lease is meant a transfer of the tenant's whole interest therein. This may be effected by a voluntary conveyance, or by operation of law. Every tenant, except one at will, has power to make such a transfer of his rights, unless

restrained by his lease, and every lease for a term of years is capable of being assigned, whether the term is in possession, or is to commence *in futuro;* and even the possibility of a term, or a power coupled with an interest, is assignable in equity. *Robinson* v. *Perry*, 21 Ga. 183; *King* v. *Lawson*, 98 Mass. 309.

Where the lease itself is required by the statute of frauds to be in writing, an assignment of it must also be in writing. *Botting* v. *Martin*, 1 Camp. 318; *Brewer* v. *Dyer*, 7 Cush. 337; *Hess* v. *Fox*, 10 Wend. 437.

The terms usually employed to express such a transfer are "grant, assign and set over," but any words which show that to be the intent of the parties will suffice. It need not express any consideration; but it must be absolute, and be unconditionally delivered to the assignee. *Peabody* v. *Fenton*, 3 Barb. Ch. 451. A constructive delivery is sometimes held sufficient, but a mere delivery as security is not. *Odell* v. *Wake*, 3 Camp. 394; *Doe d. Maslin* v. *Roe*, 5 Esp. 105. Covenants may properly be inserted on the part of the assignor as to the validity of the lease and his power to assign, and for indemnity and quiet enjoyment, and on the part of the assignee to pay the rent and perform the covenants of his assignor.

To be an assignee of a lease, one must claim through, or be in of the same estate as the person whom he succeeds, and not by or under an elder title. But the fact that a person other than the lessee is found in possession of demised premises is presumptive evidence that he is an assignee and not an undertenant, especially if he has paid rent to the original landlord. *Acker* v. *Witherell*, 4 Hill, 112.

A conveyance of land to which a demise of a water power is appurtenant operates to transfer the lease, and makes the grantee liable for the rent. *Provost* v. *Calder*, 2 Wend. 517. At common law, the marriage of a female lessee transfers the term by operation of law to her husband. Co. Litt. 44 b, 351 a. On the death of a lessee, his leasehold estate goes, as assets, to his executors or administrators, or, if disposed of by his will, to his devisee, and they take and are liable as assignees in law of the lease. *Holford* v. *Hatch*, Doug. 184; *James* v. *Dean*, 11 Ves. 393; *Tremeere* v. *Morison*, 4 M. & Scott, 603; 1 Bing. N. C. 89. And a sale of a term on execution makes the purchaser an assignee; but *it seems* the sheriff must execute to him a written assignment of the lease. *Taylor* v. *Cole*, 3 Term, 292; *Doe d. Hughes* v. *Jones*, 9 M. & W. 372; 6 Jur. 302; 12 L. J. Exch. 265.

§ 2. **Underletting.** This differs from an assignment in the essential fact that some reversionary interest, no matter how inconsiderable, is retained by the original tenant. *Constantine* v. *Wake*, 1 Sweeney (N.

Y.), 239; *Fulton* v. *Stuart*, 2 Ham. (Ohio) 216; *Bedford* v. *Terkune*, 30 N. Y. (3 Tiff.) 453; *Smiley* v. *Van Winkle*, 6 Cal. 605.

Unless limited by his lease, any tenant, except one at will, has a right to underlet for so long as his interest continues. *Jackson* v. *Harrison*, 17 Johns. 66. He cannot, however, by so doing, discharge himself from liability to his landlord; nor can he convey any interest exceeding his own in duration. *Arnsby* v. *Woodward*, 6 B. & C. 519; 9 D. & R. 536; *Pike* v. *Eyre*, 9 B. & C. 909; 4 M. & R. 661. But a sublessee for years under a tenant from year to year will hold so long as the original tenancy continues, and even beyond the term, if the original tenant is permitted to hold over. *Oxley* v. *James*, 13 M. & W. 209; *Mackay* v. *Mackreth*, 4 Dougl. 213; 2 Chit. 461; *Peirse* v. *Sharr*, 2 Mann. & R. 418. A sublessee, under a tenant by curtesy or in dower, or other life tenant, will possess all the rights and privileges of his lessor, subject, however, to be defeated by the termination of the life estate. *Ex parte Smyth*, 1 Swanst, 337; *Doe d. Simpson* v. *Butcher*, 1 Doug. 50. Such a lease is not confirmed by an acceptance of rent by the heir or reversioner, but the sublessee holding over is a mere tenant at sufferance, unless there is a sufficient acknowledgment of his tenancy to amount to a new demise. *Doe d. Martin* v. *Watts*, 7 Term, 83.

A sublessee is liable to his immediate lessor for the payment of rent and performance of covenants, but he is not in privity with the original lessor, nor liable to him for the rent reserved in the first lease. *Harvey* v. *McGrew*, 44 Tex. 412. He will, however, be subject to distress for rent in arrear, or to eviction under that lease. If he wishes to protect himself against loss by reason of the failure of the original lessee to pay the chief rent, he may do so by covenants in his lease, and the latter may in like manner protect himself from the consequences of a breach by his sublessee of the covenants of the original lease. *Penley* v. *Watts*, 7 M. & W. 601; *Walker* v. *Hatton*, 10 id. 249.

If a lessee, who has covenanted not to sublet without the consent of his landlord, does undertake to do so, he thereby impliedly agrees to obtain such consent as will enable him to vest in the assignee the same estate which he himself has. *Roberts* v. *Geis*, 2 Daly (N. Y.), 535.

§ 3. **Rights and liabilities of assignee.** The assignment of a lease transfers to the assignee the lessee's privity of estate, but not his privity of contract. The lessee, therefore, and his personal representatives remain liable on his express covenants, even for breaches subsequent to the assignment and the acceptance of rent from the assignee, but, as a general rule, he is no longer held liable on his im-

plied covenants. *Port* v. *Jackson*, 17 Johns. 239; *Harvey* v. *McGrew*, 44 Tex. 412; *Moale* v. *Tyson*, 2 Har. & McH. 387; *Gordon* v. *George*, 12 Ind. 408; *Fletcher* v. *McFarlane*, 12 Mass. 43; *Smyth* v. *North*, 41 L. J. Exch. 103; 7 L. R. Exch. 242. This liability extends to all breaches of covenants running with the land while he held it (*Harley* v. *King*, 2 C. M. & R. 18), and even the landlord's consent to the assignment will not operate to release him therefrom. *House* v. *Burr*, 24 Barb. 525. But if he is compelled to pay for breaches of covenant by his assignee, he is entitled to be indemnified by the latter. *Moule* v. *Garrett*, 41 L. J. Exch. 62; L. R., 7 Exch. 101; 1 Eng. Rep. 207; 20 W. R. 416; *Burnett* v. *Lynch*, 5 B. & C. 589; 8 D. & R. 368.

An assignee takes all his assignor's interest in the thing assigned, in possession or expectancy, but subject to all equities between the original parties, and to all covenants annexed to the estate while he is in possession. *Van Rensselaer* v. *Bonesteel*, 24 Barb. 365; *Blake* v. *Sanderson*, 1 Gray, 332. He is entitled to the benefit of all covenants real, annexed to the estate, which make in his favor, such as covenants for quiet enjoyment, for further assurance, for renewal, for repairs and the like. *Campbell* v. *Lewis*, 3 B. & Ald. 392; *Vernon* v. *Smith*, 5 id. 11. He only can bring an action on such covenants, unless his assignor is bound to indemnify him. *Bickford* v. *Page*, 2 Mass. 460; *Kane* v. *Sanger*, 14 Johns. 89; *Griffin* v. *Fairbrother*, 1 Fairf. 91.

An assignment of the lease of a building to which the lessor has verbally agreed to add another story, in consideration of additional rent to be paid, carries a right to the use of such story when erected, but does not bind the assignee to pay the additional rent. *Coit* v. *Braunsdorf*, 2 Sweeny (N. Y.), 74. An assignment of all the lessee's interest in possession or expectancy, passes the right to compensation for buildings, etc., under the covenants of the lessor. *Thompson* v. *Rose*, 8 Cow. 266. But an assignment of the term will not pass the rent and the benefit of covenants in an underlease, unless they are expressly assigned. *Franklin* v. *Howes*, 19 W. R. 581; 24 L. T. (N. S.) 348.

An assignee of a lease can sue a stranger for the negligent destruction of buildings on the demised premises. *Cook* v. *Champlain Transp. Co.*, 1 Denio, 91. But he has no remedy against his assignor for an eviction, unless there is an express covenant for quiet enjoyment. *Waldo* v. *Hall*, 14 Mass. 486.

An assignee is liable to the original lessor for rent accruing due after the assignment (*Cox* v. *Fenwick*, 4 Bibb, 538; *McCormick* v. *Young*, 2 Dana, 294; *Graves* v. *Porter*, 11 Barb, 592), even before he enters

into possession. *Babcock* v. *Scoville*, 56 Ill. 461; *Walker* v. *Reeve*, 2 Dougl. 461, *n*. He is also liable to his assignor for ground rent which the latter has been obliged to pay. *Stone* v. *Evans*, Peake's Add. C. 94. An assignee, who covenants absolutely to pay and perform all the covenants of the lease, is directly liable to his assignor for a default in payment of rent, whether the latter has been called on for it or not. *Jackson* v. *Port*, 17 Johns. 479; *Rawlings* v. *Duvall*, 4 Har. & McH. 1. If an assignee receives possession before any rent has become due, agreeing "to take the lease subject to the terms of the same, and pay rent at the times specified therein," he is bound to pay arrears of rent from the commencement of the term (*Martineau* v. *Steele*, 14 Wis. 272), but if the assignment provides that the lease shall be transferred free from all incumbrances, the assignee assumes only the rent to accrue from the time of the transfer. *Hull* v. *Stevenson*, 13 Abb. N. S. (N. Y.) 196.

Such liability of an assignee is, however, terminated by an absolute transfer or assignment of his whole unexpired term. *Trabue* v. *McAdams*, 8 Bush (Ky.), 74; *Durand* v. *Curtis*, 57 N. Y. (12 Sick.) 7. When undivided interests in a lease are assigned to several persons by separate assignments, they are liable for the rent severally, but not jointly. *Babcock* v. *Scoville*, 56 Ill. 461.

Covenants which run with the land bind the assignee of the lease, though not named therein (*Jacques* v. *Short*, 20 Barb. 269); but not those which are merely collateral, such as covenants to build, or to pay a *bonus*; nor is he liable for breaches committed by those who preceded him in the enjoyment of the premises, but only for his own. *Tillotson* v. *Boyd*, 4 Sandf. 516; *Paul* v. *Nurse*, 2 M. & R. 525; *Staines* v. *Morris*, 1 Ves. & B. 11; *Townsend* v. *Scholey*, 42 N. Y. (3 Hand) 18. This liability of an assignee ceases with his possession, whether he assigns or is evicted. *Barnfather* v. *Jordan*, 2 Dougl. 452; *Astor* v. *L'Amoreux*, 4 Sandf. 524; *Childs* v. *Clark*, 3 Barb. Ch. 52. To operate as a discharge of such assignee, the assignment must be of his whole interest, but it makes no difference whether it runs to a responsible person or not. *Taylor* v. *Shum*, 1 B. & P. 21; *Johnson* v. *Sherman*, 15 Cal. 287; *Sanders* v. *Partridge*, 108 Mass. 556. A partial eviction discharges the assignee only *pro tanto* from the payment of rent. *Stevenson* v. *Lambard*, 2 East, 575.

These rules as to the liability of an assignee apply also to one who becomes so by operation of law, if he takes possession; but whether they do if he fails to take possession is questionable. *People* v. *Dudley*, 58 N. Y. (13 Sick.) 323; *Sutliff* v. *Atwood*, 15 Ohio St. 186; *Calvert* v.

Bradley, 16 How. (U. S.) 580; *Welch* v. *Myers*, 4 Camp. 368; *How* v. *Kennett*, 3 A. & E. 659; *Hendricks* v. *Judah*, 2 Caines (N. Y.), 25.

An executor of a lessee is held liable as an assignee of the lease, though he does not enter; an administrator only when he enters; and if either of them enters and receives rents and profits, he is liable personally, as well as in his representative capacity, but not beyond the actual value of the use of the premises. *Pugsley* v. *Aikin*, 11 N. Y. (1 Kern.) 494; *Remnant* v. *Bremridge*, 8 Taunt. 191; *Matter of Galloway*, 21 Wend. 32; *Jermain* v. *Pattison*, 46 Barb. 12. When not named in the covenants of a lease, their liability extends only to covenants running with the land; and whatever may be its extent, they can discharge themselves by assigning, but not by underletting. *Tremeere* v. *Morison*, 1 Bing. N. C. 89; *Hornidge* v. *Wilson*, 11 Ad. & E. 645; 3 P. & D. 641.

The heir of a lessee is liable as assignee, only when he actually takes possession of the demised premises. He has no claim on them, unless the lease is dependent upon the life of another, and is granted to the lessee and his heirs.

The receiver of a lessee may waive the term if the income is not sufficient to pay the rent, and will not then be chargeable as assignee. *Martin* v. *Black*, 9 Paige, 641.

§ 4. **Conveyance of reversion.** A landlord may at any time grant the reversion of demised premises; and such a grant will carry all the leases to which the same are subject, and, if general in its terms, the rents reserved. But the covenant to pay rent may also be assigned separately (*Huerstel* v. *Lorillard*, 6 Robt. [N. Y.] 260; *Bradley* v. *Root*, 5 Paige's Ch. 633); and a covenant to leave the premises in repair will not pass, under such an assignment, but will remain to be enforced by the assignor at the expiration of the term. *Demarest* v. *Willard*, 8 Cow. 206.

A general grant of the reversion does not pass the rent already in arrears, but it does pass all that accrues or falls due subsequent to the grant, unless it has been paid by the lessee to the grantor, without notice of the change of interest. *Birch* v. *Wright*, 1 Term, 378; *Farley* v. *Thompson*, 15 Mass. 18; *Bank of Penn.* v. *Wise*, 3 Watts, 394; *Van Wicklen* v. *Paulson*, 14 Barb. 654; *Gale* v. *Edwards*, 52 Me. 363; *Kornegay* v. *Collier*, 65 N. C. 69. Notes taken by the grantor to secure the rent yet to become due will also belong to the grantee, or, if the grantor has disposed of them, he will be liable to his grantee for their amount. *Beebe* v. *Coleman*, 8 Paige, 392.

Upon a foreclosure sale of leased premises, the lessor, if a party to the suit, is entitled to all rent accruing due up to the time of surrender

of possession, even though it be advanced rent. *Giles* v. *Comstock*, 4 N. Y. (4 Comst.) 270.

When the reversion of demised premises falls by descent to several heirs, the rent is apportioned to them, and the tenant or his assignee is liable to them in severalty. *Cole* v. *Patterson*, 25 Wend. 456.

The rule of the common law, that the assignee of a reversion cannot either sue or be sued upon the covenants of a lease, has been greatly modified by various statutes, and it is now held that he stands in the same position as to the tenant as did his assignor. *Willard* v. *Tillman*, 2 Hill, 274; *McCrady* v. *Brisbane*, 1 Nott & McC. 104; *Howland* v. *Coffin*, 12 Pick. 125; *St. Mary's Church* v. *Miles*, 1 Whart. 229. If he acquires title while the lessee is in possession, with notice of his rights, he is bound by the covenants of his assignor to pay for buildings, and the like (*Bailie* v. *Rodway*, 27 Wis. 172; *Frederick* v. *Callahan*, 40 Iowa, 311); but he is not liable for a previous breach of covenant by the assignor. *Coffin* v. *Talman*, 8 N. Y. (4 Seld.) 465.

The assignee may also sue for all breaches of covenant by the lessee in his own time. *Shelby* v. *Hearne*, 6 Yerg. 512. And he may also enforce forfeitures; but not one which was waived by his assignor previous to the assignment. *Page* v. *Esty*, 54 Me. 319; *Fanning* v. *Voelker*, 40 Mo. 129; *Watson* v. *Fletcher*, 49 Ill. 498.

An assignee of part of a reversion is entitled to the benefit of, and is liable on covenants running with the land, and if they are divisible in their nature, he may sue and be sued thereon. *Stevenson* v. *Lambard*, 2 East, 575; *Simpson* v. *Clayton*, 4 Bing. N. C. 758; 6 Scott, 469; *Astor* v. *Miller*, 2 Paige, 68.

ARTICLE VIII.

RIGHT TO EMBLEMENTS AND FIXTURES.

Section 1. Emblements. Certain crops, which an outgoing tenant is entitled to take and carry away after his tenancy is ended, are termed emblements. These are limited to annual productions of the soil, raised by his labor, such as corn and other grain, straw, clover, hemp, flax, melons, potatoes and the like. Crops which are not of annual growth, and those which do not ordinarily require the labor of the tenant, but are permanent and natural products of the earth, such as trees, fruits, natural grasses and the like, are not included; nor are such as do not ordinarily mature in the same year in which labor is expended upon them. Of this class is a second crop of clover.

Graves v. *Weld*, 5 B. & Ad. 105; 2 N. & M. 725; *Fobes* v. *Shattuck*, 22 Barb. 568.

Shrubs and nursery trees, planted by gardeners and nurserymen expressly for sale, have in some cases been classed as emblements, but in other cases they are treated as fixtures, to be removed before the close of the term. *Brooks* v. *Galster*, 51 Barb. 196. See Vol. 3, 374, tit. *Fixtures*.

This right to emblements is conceded only to those whose tenure is uncertain and dependent upon some contingency, such as tenants for life or at will; or is unexpectedly determined before harvest, by the act of God or of the law, and without fault on the part of the tenant, as by death, or by notice to quit. *Oland's case*, 5 Coke, 116 *b*; *Stewart* v. *Doughty*, 9 Johns. 108; *King* v. *Fowler*, 14 Pick. 238; *Kingsbury* v. *Collins*, 4 Bing. 207. If his tenure is so uncertain that he cannot know when he sows whether it will continue until he shall reap, the tenant is entitled to emblements; otherwise not. Id.; *Whitmarsh* v. *Cutting*, 10 Johns. 361. The custom of the country or locality where the lease is made, however, sometimes enters into the contract, and gives emblements to lessees whose terms are certain; but custom will prevail only where the contract is silent or uncertain, and there is no express covenant. *Stultz* v. *Dickey*, 5 Binn. 285; *Demi* v. *Bossler*, 1 Penn. 224; *Iddings* v. *Nagle*, 2 Watts & S. 22.

If a lease contains no reservations, the tenant is entitled to remove all the crops harvested during his term. *Willey* v. *Conner*, 44 Vt. 68; *Clark* v. *Harvey*, 54 Penn. St. 142. A lease terminable in the spring of any year, in case the farm is sold, is practically one at will, and the tenant is entitled to a crop of grain sown by him in the fall. *Pfanner* v. *Sturmer*, 40 How. Pr. (N. Y.) 401. So, also, where the lease terminates absolutely in the spring, if the tenant sows wheat in the fall in pursuance of a stipulation in his lease, or by direction of his landlord. *Kelley* v. *Todd*, 1 W. Va. 197; *Armstrong* v. *Bicknell*, 2 Lans. (N. Y.) 216; *Van Doren* v. *Everitt*, 2 South. (N. J.) 460.

Undertenants are entitled to emblements and have a right to the possession so far as is necessary to preserve and gather them. *Bevans* v. *Briscoe*, 4 Har. & J. (Md.) 139.

One who enters under a parol agreement for the purchase of land, with the right to occupy and work it until the vendor is ready to convey, is entitled to a crop of grain sown by him. *Harris* v. *Frink*, 49 N. Y. (4 Sick.) 24; 10 Am. Rep. 318. A mere permission to sow, given by an agent having no authority in the premises, will not suffice to give him the crops. *Clarke* v. *Rannie*, 6 Lans. (N. Y.) 210.

If a tenant quits or forfeits possession, or terminates his tenancy by

his own act or fault, his crops belong to the landlord. *Carpenter* v. *Jones*, 63 Ill. 517; *Debow* v. *Colfax*, 5 Halst. 128; *Bulwer* v. *Bulwer*, 2 B. & Ald. 470; *Davis* v. *Eyton*, 7 Bing. 154. But that will not affect the rights of undertenants who did not participate in destroying the estate. *Bevan* v. *Briscoe*, 4 Har. & J. (Md.) 139. A tenant who is evicted may hold as emblements crops growing on the premises which were put in by his servant. *Kenna* v. *Nugent*, 7 Ir. R. C. L. 464.

A lessee of land which is incumbered by a prior judgment is entitled to the way growing crop in preference to the execution purchaser (*Adams* v. *McKesson's Exr.*, 53 Penn. St. 81); but one who takes a lease subsequent to a mortgage has been held not entitled as against the mortgagee, to the crops growing at the time of the foreclosure and sale (*Lane* v. *King*, 8 Wend. 584; *Shepard* v. *Philbrich*, 2 Den. 174; *Sherman* v. *Willett*, 42 N. Y. [3 Hand] 146); and one who sows grain pending a suit for possession against his landlord cannot take away the crop after judgment and surrender of possession in favor of the plaintiff. *Rowell* v. *Klein*, 44 Ind. 290.

If a tenant dies after sowing grain, the emblements go to his personal representatives, or if the land sown is assigned as dower, then to his widow.

A tenant at will is entitled to emblements, and evidence respecting their value is competent in an action against the owner of the land for their recovery. *Reilly* v. *Ringland*, 44 Iowa, 422.

§ 2. **Fixtures.** The nature of fixtures and the rules applicable to them have been so fully explained in the chapter devoted to that subject (*ante*, Vol. 3, 368), that but little need be added here. Fixtures may be briefly defined as articles of a personal nature, so affixed to real property as to constitute a part thereof. Removable fixtures, which alone require attention here, are things attached to a dwelling-house, to render the occupation thereof more pleasant, comfortable or convenient, also engines, machinery and other things for use in trade or manufacturing, and, to some extent, buildings for the purposes of trade or agriculture. The term also includes trees and shrubbery planted for the purpose of sale, by gardeners and nurserymen, but not those raised by other persons for their own use. *Brooks* v. *Galster*, 51 Barb. 196; *Wyndham* v. *Way*, 4 Taunt. 316. The essential thing is, that they be capable of removal without destroying or seriously injuring the freehold, or leaving it in a worse condition than it was before their annexation. *Whiting* v. *Brastow*, 4 Pick. 311. When the question arises whether they are so or not, it is one for a jury to decide.

This right to remove fixtures is conceded to tenants for life, for years, or at will; and the rules in relation to it, though very strict as between grantors and grantees, are to be construed with the greatest liberality in favor of tenants. *Ombony* v. *Jones*, 19 N. Y. (5 Smith) 234; *Tate* v. *Blackburne*, 48 Miss. 1. A tenant for life, however, cannot remove buildings of a permanent character. *Cannon* v. *Hare*, 1 Tenn. Ch. 22. The right may be enlarged or varied by special agreement between the parties, or by the local customs of the country. In the absence of any such agreement or custom, the removal must be made by the tenant before the expiration of his term, or at least before he quits possession, and while he has a right to consider himself a tenant under the original lease. *Lyde* v. *Russell*, 1 B. & Ad. 394; *Fitzherbert* v. *Shaw*, 1 H. Bl. 258; *White* v. *Arndt*, 1 Whart. 91; *Preston* v. *Briggs*, 16 Vt. 124; *Reynolds* v. *Shuler*, 5 Cow. 323; *Haflick* v. *Stober*, 11 Ohio St. 482; *Dostal* v. *McCaddon*, 35 Iowa, 318; *Cromie* v. *Hoover*, 40 Ind. 49. If he leaves them on the premises with the landlord's consent, he may afterward remove them; but generally they are deemed abandoned and fall to the landlord if there when he takes possession. *Hallen* v. *Runder*, 3 Tyr. 959; *McCracken* v. *Hall*, 7 Ind. 30.

Exceptions to this rule as to time of removal are made in favor of lessees holding by an uncertain tenure, as, for life, at will, or until the happening of some event, and of those leasing for the purpose of nurturing trees and plants until ready to be transplanted; and they are allowed a reasonable time to remove after the termination of their interest. *Weeton* v. *Woodcock*, 7 M. & W. 14; *Lawton* v. *Lawton*, 3 Atk. 13; *Northern Cent. Co.* v. *Canton Co.*, 30 Md. 347; *Miller* v. *Baker*, 1 Metc. (Mass.) 27; *King* v. *Wilcomb*, 7 Barb. 263.

The right to remove also ceases on forfeiture, or re-entry for condition broken (*Whipley* v. *Dewey*, 8 Cal. 36); and even upon a renewal of the lease, without reserving fixtures already annexed. *Shepard* v. *Spaulding*, 4 Metc. 416; *Merritt* v. *Judd*, 14 Cal. 59; *Davis* v. *Moss*, 38 Penn. St. 346; *Loughran* v. *Ross*, 45 N. Y. (6 Hand) 792; 6 Am. Rep. 173.

If the landlord claims the fixtures and forbids their removal, threatening suit, the lessee may leave them, and treat the landlord's acts as a conversion. *Vilas* v. *Mason*, 25 Wis. 310.

If by the terms of his lease the tenant is to be deemed the owner of buildings erected by him, he may either sell or remove them. (*Alexander* v. *Touhy*, 13 Kans. 64); and if it is stipulated that he may remove such buildings at the expiration of his term, he is entitled to a reasonable time afterward in which to do it. *Cheatham* v. *Plinke*, 1 Tenn. Ch.

576. But if he expressly covenants to repair and to yield up buildings erected by him, he is bound by such covenant. *Naylor* v. *Collinge*, 1 Taunt. 19.

ARTICLE IX.

RIGHTS AND LIABILITIES IN GENERAL.

Section 1. In general. Numerous rights and liabilities grow out of the relation between the parties to a lease, not depending upon express covenants. Among these are the landlord's right to rent, already considered, and his right to enter upon the premises, and to use all ways appurtenant in so doing. Thus, he may enter for the purpose of demanding rent or arranging for its payment, or the purpose of repairing to prevent waste, or of removing an obstruction; but he has no right to enter for other purposes without the consent of the tenant unless he has reserved it. *Proud* v. *Hollis*, 1 B. & C. 8; *Lehman* v. *Shackleford*, 50 Ala. 437; *Blake* v. *Jerome*, 14 Johns. 406. Where the rent is payable in hay, he has no right to enter and take it away, until it is severed and delivered to or set apart for him. *Dockham* v. *Parker*, 9 Me. 137. And replevin will not lie at the suit of a landlord against his tenant for rent wheat left in the barn, on the premises by the preceding tenant, for the landlord, as his share of the preceding year, without proof of an actual demand and refusal before action brought. *Alrichs* v. *Bowers*, 3 Houst. (Del.) 367.

At the expiration of the lease, the landlord is entitled to full possession, and if it is not delivered, he can hold the tenant for the rent. *Noel* v. *McCrory*, 7 Coldw. (Tenn.) 623.

The liabilities of a landlord, founded on his possession, are, in general, suspended as soon as the tenant takes possession. He is not therefore liable for injuries to third parties, caused by the ruinous state of the premises, or of the fences on them. *Cheetham* v. *Hampson*, 4 Term, 318; *Mayor, &c.*, v. *Corlies*, 2 Sandf. 301. And see *Batterman* v. *Finn*, 32 How. (N. Y.) 501. It is otherwise if he has covenanted to repair, or the injury is caused by the negligence of workmen employed by him. *Payne* v. *Rogers*, 2 H. Bl. 350; *Leslie* v. *Pounds*, 4 Taunt. 649.

He is not liable to his tenant for personal injuries sustained by reason of the defective condition of the buildings, unless he is chargeable with some affirmative misfeasance, or neglect of positive duty or breach of covenant to repair. *O'Brien* v. *Capwell*, 59 Barb. 497; *Kahn* v. *Love*, 3 Oreg. 206. Nor is he liable to a third person for a nuisance

created or continued on the premises by his tenant, unless he knew or had reason to believe at the time of the letting that it would be so created; but if he re-lets, or renews a lease while the nuisance exists there, he is liable. *Rex* v. *Pedley*, 1 A. & E. 827; *Waggoner* v. *Jermaine*, 3 Denio, 306; *Pickard* v. *Collins*, 23 Barb. 444. The contrary is held in Georgia. *Center* v. *Davis*, 39 Ga. 210. See *post*, tit. *Nuisance.*

The lessor is not liable for a nuisance to a highway on the premises, existing at the time of the demise, if the lessee is under obligation to repair. *Gwinnell* v. *Eamer*, L. R., 10 C. P. 658; 14 Eng. Rep. 492; S. C., 32 L. T. (N. S.) 835. Nor is he liable to his tenant for damages caused by the existence of noxious plants on agricultural lands leased by him, nor for damages caused by noxious animals. *Erskine* v. *Adeane*, L. R., 8 Ch. App. 756; S. C., 6 Eng. R. 594; 42 L. J. Ch. 835; *Carstairs* v. *Taylor*, L. R., 6 Exch. 217; S. C., 40 L J. Exch. 129.

Upon the execution of the lease, and before the tenant takes possession, whether it is to commence at once or not, the tenant acquires an interest, which is assignable and will on his death pass to his personal representatives. *Whitney* v. *Allaire*, 1 N. Y. (1 Comst.) 305. This interest extends to the whole of the premises leased, and he is not bound to accept part, but may abandon if not put in possession of the whole. *Hay* v. *Cumberland*, 25 Barb. 594. But if he enters and retains possession of part, he is liable for the rent *pro tanto*. *Hurlbut* v. *Post*, 1 Bosw. (N. Y.) 28. If before the day named for his receiving possession the landlord renders the dwelling unfit for habitation, by wrongfully removing a fixture, the tenant may refuse to accept possession. *Cleves* v. *Willoughby*, 7 Hill, 83. And he is not liable on his lease if the premises are destroyed by fire before the term begins. *Wood* v. *Hubbell*, 10 N. Y. (6 Seld.) 488.

On taking possession, he is entitled to use and enjoy all the easements and privileges which are appurtenant to the tenement, and also to take such reasonable estovers and emblements as are attached to the estate, unless specially restrained by his lease. A tenant for years of a farm has the right to cut wood thereon for his own fires and for repairs. *Hubbard* v. *Shaw*, 12 Allen, 120.

If the leased buildings are pulled down by public authority, the tenant is entitled to compensation from the public for his interest therein, in the same cases where the owner would be for his interest. *Mayor of N. Y.* v. *Lord*, 17 Wend. 285; 18 id. 126.

He can sell or mortgage his crops (*Jones* v. *Webster*, 48 Ala. 109); and his creditors can sell his term on execution. *Ex parte Wilson*, 7 Hill, 150.

It is the duty of a tenant to protect the rights of his landlord, and he has no right to attorn to a stranger unless by his landlord's consent, or pursuant to a judgment or order of court, or to a mortgagee after forfeiture, but he is bound to notify his landlord of any attempt to dispossess him. This duty is, in some of the States, enforced by statutory penalties. He must also preserve the boundaries of the demised premises (*Att'y-General* v. *Fullerton*, 2 Ves. & B. 263); and must discharge all the duties imposed on the premises by municipal authority. And he must not disturb the possession of his landlord's other tenants. *Keay* v. *Goodwin*, 16 Mass. 3; *Browning* v. *Delesme*, 3 Sandf. (N. Y.) 13.

The tenant's liability for rent has already been stated. This liability is not discharged by the destruction of the premises after he has taken possession, unless there are covenants to that effect. *Fowler* v. *Payne*, 49 Miss. 32.

He is liable on the covenants of his lease, even though he does not take possession, and any person who enters by his consent is liable on them in his place. *Howard* v. *Ellis*, 4 Sandf. (N. Y.) 369. He is also liable to his landlord for any injury to the premises caused by his carelessness or negligence; but if he is only one of several tenants of the same building, his liability is limited to his own negligence, unless they have made themselves jointly liable. *Moore* v. *Goedel*, 34 N. Y. (7 Tiff.) 527.

A tenant is also liable to third parties for injuries caused by his neglect to keep the premises in a safe condition, as, by not repairing ways, fences, or party walls, by not properly covering or protecting walls, trap doors, excavations, sewers and holes; by not guarding against accidents when building, and the like, and for those caused by his obstructing highways, streets, and walks, or creating or continuing nuisances on the premises. *Commonwealth* v. *Passmore*, 1 Serg. & R. 217; *Rex* v. *Russell*, 6 East, 427; *Rider* v. *Smith*, 3 Term, 766; *Coupland* v. *Hardingham*, 3 Camp. 398; *Hadley* v. *Taylor*, 11 Jur. (N. S.) 979; S. C., 14 W. R. 59; *Proctor* v. *Harris*, 4 C. & P. 337; *Norton* v. *Wiswall*, 26 Barb. 618; *Lowell* v. *Spalding*, 4 Cush. 277.

§ 2. **Disputing landlord's title.** It is a general rule that both tenants and their privies in blood or estate are estopped from disputing the title of the landlord or of any one who succeeds to his rights, so long as they hold the possession originally derived from him. *Bertram* v. *Cook*, 32 Mich. 518; *Hughes* v. *Watt*, 28 Ark. 153; *Cook* v. *Creswell*, 44 Md. 581; *Brenner* v. *Bigelow*, 8 Kans. 497; *Mattis* v. *Robinson*, 1 Neb. 3; *Frazer* v. *Robinson*, 42 Miss. 121; *Hardy* v.

Akerly, 57 Barb. 148; *Phelps* v. *Taycor*, 23 La. Ann. 585; *Bedford* v. *Kelly*, 61 Penn. St. 491; *Ronaldson* v. *Tabor*, 43 Ga. 230. The tenant may, however, show that the landlord's title has expired, or that some change has taken place in it since the lease; that he has himself purchased a title not inconsistent with his duty as a tenant; or that he was induced to accept the lease or possession by fraud or mistake. *Bigler* v. *Furman*, 58 Barb. 545; *Neave* v. *Moss*, 1 Bing. 360; 8 Moore, 389; *Pentz* v. *Kuester*, 41 Mo. 447.

In the absence of a written lease this estoppel arises from the possession and consequent benefit to the tenant. *Fuller* v. *Sweet*, 30 Mich. 237; 18 Am. Rep. 122. After receiving the full benefit of a lease granted by lessors in their own name, the tenant cannot dispute their title, although they were in fact mere agents. *Stott* v. *Rutherford*, 92 U. S. (2 Otto) 107. Even one who takes a lease by indenture of his own land is estopped until his term expires. *James* v. *Landon*, Cro. Eliz. 36. But if he was in possession at the time of taking his lease, he is not estopped from setting up his paramount title. *Peralta* v. *Ginochio*, 47 Cal. 459.

If a person having a mere naked possession accepts a lease from one claiming ownership, in order to save litigation, he cannot afterward dispute the title of his lessor. *Bowdish* v. *Dubuque*, 38 Iowa, 341; *Lucas* v. *Brooks*, 18 Wall. 436. And yet, if one in possession under a lease attorns to a third party, he is not thereby estopped from showing want of title in that party. *Cornish* v. *Searell*, 1 M. & R. 703; S. C., 8 B. & C. 471.

A tenant holding over, and sued for rent accruing after the expiration of his term, cannot surrender a part and dispute his landlord's title to the remainder. *Longfellow* v. *Longfellow*, 54 Me. 240. A tenant of trust property cannot dispute the title of the trustee, even after he has married the *cestui que* trust. *Baker* v. *Nall*, 59 Mo. 265. Nor can a tenant hold over under claim of title in his wife. *Miller* v. *Lang*, 99 Mass. 13.

A judgment debtor, who accepts a lease from the purchaser at execution sale, cannot assert a homestead right in the premises to which he may be entitled, until his lease expires. *Abbott* v. *Cromartie*, 72 N. C. 292; 21 Am. Rep. 457.

A tenant bound by his lease to pay the taxes cannot acquire a valid tax title. *Carithers* v. *Weaver*, 7 Kans. 110; *Jones* v. *Davis*, 24 Wis. 229. Nor, where the landlord holds under a tax deed, can his tenant buy up a minor's right of redemption and set it up against his lessor. *Stout* v. *Merrill*, 35 Iowa, 47.

But a tenant, who was induced to execute the lease by fraud or mis-

representation on the part of his landlord, may dispute the title of the latter, or buy up and assert a superior title. *Gallagher* v. *Bennett*, 38 Tex. 291; *Jenckes* v. *Cook*, 9 R. I. 520; *Evans* v. *Bidwell*, 76 Penn. St. 497. And if the title of the landlord is adjudged void after possession has been taken under the lease, the tenant may disclaim and take a lease from the person to whom it is adjudged. *McAusland* v. *Pundt*, 1 Neb. 211.

To be binding upon either party, the estoppel must be reciprocal and mutual, so as to bind both. The lease must, therefore, be between parties capable of contracting, and must be by indenture, or by instruments executed by both parties. *Champlain, etc., R. R. Co.* v. *Valentine*, 19 Barb. 484; *Bolling* v. *Mayor*, 3 Rand. (Va.) 563.

The policy of the law will not permit the tenant to avail himself of the advantage of his possession to purchase incumbrances on the leasehold property for the purpose of speculation. But if, while in possion under the lease, the presumption is that he did it for the only purpose permitted by law, that is, to protect his possession; and, if the tenancy is for years, the landlord must account to him for what he actually paid for such incumbrance. *Thrall* v. *Omaha Hotel*, 5 Neb., 295.

§ 3. **Adverse possession.** At common law, and by statute in many of the American States, an adverse possession of land, existing at the time a lease thereof is given, renders such lease void. By an adverse possession is meant an actual possession, by a party holding under some color or claim of title which is adverse to the title of another claimant. *Jackson* v. *Newton*, 18 Johns. 355. An entry without such claim or color will be deemed in subservience to the title of the legal owner, and a clear change in the nature of the holding must take place before it can become adverse. *Jackson* v. *Thomas*, 16 Johns. 293; *Lund* v. *Parker*, 3 N. H. 49. Where a possession is commenced rightfully and with the consent of the owner, as in the case of a tenancy, nothing is to be presumed to make it adverse. Mere holding over does not have that effect. *Gwynn* v. *Jones*, 2 Gill & J. (Md.) 173.

A tenant who remains quietly in possession, making no adverse claim until a surrender is demanded, cannot then make his possession adverse by mere words, not sustained by facts. *Hoysett* v. *Ellis*, 17 Mich. 351. A mere disclaimer of the landlord's title and attornment to another does not operate as a disseizin of the landlord, unless he elects so to consider it, as he may do. *Blue* v. *Sayre*, 2 Dana (Ky.), 213.

An adverse possession, continued for the time limited by statute, becomes a title; but before a tenant can begin to acquire any prescrip-

tive right, he must repudiate his tenancy and give his landlord notice thereof. *Stacy* v. *Bostwick*, 48 Vt. 192. Even after he has acquired a hostile title, he cannot, as a general rule, set it up against his landlord until he has first restored him to possession. *Doe d. Newton* v. *Roe*, 33 Ga. 163; *Lowe* v. *Emerson*, 48 Ill. 160.

It is the duty of a tenant, against whom an action of ejectment is brought by a stranger, to notify his landlord thereof, and, if he neglects to do so, he cannot, after judgment against him, attorn to the plaintiff or purchase his title and set it up against the landlord. Id.

An attornment by a tenant to a stranger is absolutely void as against the landlord, unless it is made with his consent or pursuant to or in consequence of a judgment or order of court, or is made to a mortgagee after the mortgage has become forfeited; and, except in such cases, it cannot change his possession so as to make it adverse. Nor can one, who goes into possession as a mere squatter, disclaiming title, by secretly attorning to a stranger, make his possession adverse to the true owner. *Gay* v. *Mitchell*, 35 Ga. 139.

§ 4. **Right of entry by tenant.** The right of a tenant for life to enter upon the demised premises must attach upon the execution and delivery of the lease, as the tenancy must commence *in presenti;* but that of a tenant for years will not become complete until the day fixed by the lease or agreement. When the day arrives, he is entitled to receive possession of the entire premises, in the same condition as they were in on the day of the demise, and he has a remedy against whoever wrongfully withholds it from him. *Trull* v. *Granger*, 8 N. Y. (4 Seld.) 115; *Cilley* v. *Hawkins*, 48 Ill. 308. He may also refuse to take possession if the landlord renders the premises unfit for habitation by removing a fixture, or if he does not put him in full possession; but he may, if he chooses, occupy the part of which he obtains possession, and then he will be liable only for a proportionate amount of rent. *Cleves* v. *Willoughby*, 7 Hill; 83; *Wood* v. *Hubbell*, 10 N. Y. (6 Seld.) 488; *Hay* v. *Cumberland*, 25 Barb. 594.

A lessee who is expelled for breach of a condition in his lease, cannot re-enter for the purpose of harvesting crops planted by him. *Hunter* v. *Jones*, 7 Phil. (Penn.) 233. A tenant for years, whose estate has become vested by entry, if evicted by a stranger, has nothing left but a right of entry, and that the law will not suffer him to transfer.

If a lease embraces property which is in the actual control of third parties, they cannot be dispossessed by proceedings under it. *Blackman* v. *Welsh*, 44 Mo. 41.

§ 5. **Repairs.** The duty of tenants in respect to repairs, under implied as well as express covenants, has already been stated. Where

repairs are made at his request, a tenant is liable for them, although their cost exceeds the amount which his lease requires him to expend. *Benjamin* v. *Heeney*, 51 Ill. 492. Notwithstanding this liability of the tenant, the landlord has the right to enter and make such permanent repairs as are necessary to prevent waste, and are indispensable to the due protection of his reversionary interest, as for instance, to put a new roof on a house; but he must take all reasonable care to prevent injury to the property of the occupants by the elements. *Sulzbacher* v. *Dickie*, 51 How. Pr. (N. Y.) 500; *Glickauf* v. *Maurer*, 75 Ill. 289 20 Am. Rep. 238. Even where the landlord has bound himself to make necessary repairs, the tenant cannot make them and charge him with the expense, without his consent or authority, unless after notice he refuses to make them. *Gott* v. *Gandy*, 2 El. & B. 845; 2 C. L. R. 392; 18 Jur. 310; *Pizey* v. *Rogers*, 1 Ry. & Moo. 357; *Mumford* v. *Brown*, 6 Cow. 475; *McCarty* v. *Ely*, 4 E. D. Smith (N. Y.), 375; *Favrot* v. *Mettler*, 21 La. Ann. 220; *Westermeier* v. *Street*, id. 714.

In several of the American States, a landlord is required by statute to keep premises in tenantable condition, and his failure to do so entitles the tenant either to quit the possession, or to repair at the landlord's expense. *Perrett* v. *Dupre*, 3 Rob. (La.) 52; *Coleman* v. *Haight*, 14 La. Ann. 564; *Johnson* v. *Oppenheim*, 55 N. Y. (10 Sick.) 280.

A tenant is generally liable both to his landlord and to third parties for damages arising from his neglect to repair division fences and party walls, or from the unsafe condition of the premises, unless such condition is the result of causes beyond the control of the tenant. *Chicago* v. *O'Brennan*, 65 Ill. 160; *Payne* v. *Rogers*, 2 H. Bl. 350; *Exall* v. *Partridge*, 8 Term R. 308. See *Driver* v. *Maxwell*, 56 Ga. 11. But a tenant of part of a building is under no obligation to rebuild a ruinous chimney, and if it falls and damages the goods of tenants, the landlord is liable. *Eagle* v. *Swayze*, 2 Daly (N. Y.), 140. Nor is a lessee liable for damages caused by want of repairs, where the landlord has expressly covenanted to keep in repair, or has let the premises with a nuisance upon them. *Gridley* v. *Bloomington*, 68 Ill. 47.

If a landlord rent different tenements in the same building to different tenants, and the store-room rented to one tenant is under rooms used as a hotel, rented to another, and immediately over the store-room there is a water-closet *properly constructed* and kept in proper repair by the landlord, but so improperly or negligently used by the occupants of the hotel as to cause damage to the goods in the store below, the tenant of the hotel is responsible for the damage to his co-tenant of the store-room, and the landlord is not. *White* v. *Montgomery*, 58 Ga. 204; *Moore* v. *Goedel*, 7 Bosw. 591: 34 N. Y. (7 Tiff.) 527. See

Kastor v. *Newhouse*, 4 E. D. Smith, 20; *Ortmayer* v. *Johnson*, 45 Ill. 469. *Post*, 278.

§ 6. **Improvements.** As used in leases, the term "improvements" is more comprehensive than the term "fixtures." It embraces every addition, alteration, erection or annexation, made by the lessee during the term for his own use. Every such improvement inures to the benefit of the landlord at the expiration of the lease, and the tenant is not entitled to pay therefor, unless by custom or by express agreement. *Kutter* v. *Smith*, 2 Wall. 491. Even a permanent right of way appurtenant to the demised premises, which has been acquired by the tenant, has been held to appertain to the landlord. *Dempsey* v. *Kipp*, 61 N. Y. (16 Sick.) 462. The tenant may, however, and frequently does reserve, a right to remove buildings, etc., placed by him on the premises, and when he does so, he must remove them before the expiration of his term, if no other time is fixed therefor, and if he does not, they will belong to his lessor. *Mayor, etc., of N. Y.* v. *Exchange F. Ins. Co.*, 3 Abb. App. Dec. 261; S. C., 3 Keyes, 436; 34 How. 103.

The right of tenants to pay for improvements is, in some localities and to some extent, regulated by customs entering into the contract of leasing. *Senior* v. *Armytage*, Holt, 197; *Hutton* v. *Warren*, 1 M. & W. 466.

An agreement by a landlord to pay for buildings erected by a tenant does not affect his right to dispossess the tenant for non-payment of rent. *Paine* v. *Trinity Ch.*, 7 Hun (N. Y.), 89. But such eviction entitles the tenant to remove buildings which the lease gave him the right to remove at the end of his term. *Wright* v. *Lattin*, 38 Ill. 293. If, however, the tenant voluntarily leaves the premises before the expiration of his term, even with the consent of the landlord, he loses his right to be paid for improvements, unless he reserves it by fresh agreement. *Whittaker* v. *Barker*, 1 Cro. & M. 113.

A provision in a lease, that at the "end of the term, all rents and covenants being complied with by the lessee, he shall have the right to remove any buildings he may have erected on the premises during the term," makes such compliance a condition precedent to their removal, and tender of performance is not sufficient. *Clemens* v. *Murphy*, 40 Mo. 122.

An eviction by a landlord, who has covenanted that the tenant, in consideration of repairs and improvements to be made by him, shall retain possession so long as he pays rent, renders him liable to pay for the improvements. *Oneal* v. *Orr*, 5 Bush (Ky.), 649. But the refusal of a landlord, who has put a tenant in possession, promising him a

written lease, to give such lease, is not an eviction which will entitle the tenant to pay for improvements. *Yates* v. *Bachley*, 33 Wis. 185.

§ 7. **Manure.** In leases of farming lands, the implied covenant for good husbandry requires that the manure made upon the land during the last year of the tenancy be left by the tenant for his successor. *Watson* v. *Welch*, 1 Esp. N. P. 131. The tenant has therefore no right to remove manure made in whole or in part from the produce of the land, unless by virtue of some express agreement on that subject. *Gallagher* v. *Shipley*, 24 Md. 418; *Waln* v. *Connor*, 5 Penn. St. L. J. 164; *Goodrich* v. *Jones*, 2 Hill, 142. But the right of the landlord to such manure cannot be prejudiced by any agreement between the outgoing and the incoming tenant. See *ante*, Vol. 3, 371, 393.

Manure made in a livery stable, or in any way not connected with agriculture, does not become attached to the realty. *Carroll* v. *Newton*, 17 How. Pr. (N. Y.) 189; *Daniels* v. *Pond*, 21 Pick. 367. And this is so, even though it is left on the premises after the expiration of the term. *Fletcher* v. *Herring*, 112 Mass. 382. A tenant at will, who feeds cattle on the demised premises from his own hay, brought for that purpose, is, therefore, entitled to the manure, and may sell or remove it, either before or after he leaves the premises. *Corey* v. *Bishop*, 48 N. H. 146.

ARTICLE X.

LANDLORD'S REMEDIES.

Section 1. In general, and right to rent. The transfer by a landlord of the possession of his land involves a transfer of all rights of action which depend upon possession, and leave to him only those remedies which relate to the protection of his reversionary interests, or the enforcement of the duties and liabilities of his tenants. He cannot, therefore, maintain an action for a temporary injury to the premises, while they are in the actual lawful possession of a tenant. *Campbell* v. *Arnold*, 1 Johns. 511; *New Jersey, etc., Railway Co.* v. *Van-Syckle*, 37 N. J. Law, 497; *Bartlett* v. *Boston Gas Light Co.*, 117 Mass. 533; 19 Am. Rep. 421; *Wentworth* v. *Portsmouth, etc., R. R.*, 55 N. H. 540. But he may sue a stranger, who so far disturbs the quiet enjoyment of his tenant as to cause a loss of rent, or other damage to himself, or who enters and cuts down trees or severs fixtures. *Aldridge* v. *Stuyvesant*, 1 Hall (N. Y.), 214; *Shadwell* v. *Hutchinson*, 2 B. & A. 97; 4 C. & P. 333; *Morgan* v. *Negley*, 3 Pittsb. (Penn.) 33 *Schermerhorn* v. *Buell*, 4 Denio, 422.

The landlord's remedies against his tenant are co-extensive with the rights growing out of the relation existing between them. Not only may he sue for redress after his rights have been invaded, but he may obtain relief in equity against threatened injuries. Thus, he may have an injunction to restrain the commission of waste, the use of the premises contrary to covenant, or bad husbandry, or the unlawful removal of crops, or manure. *Howard* v. *Ellis*, 4 Sandf. (N. Y.) 369; *Steward* v. *Winters*, 4 Sandf. Ch. 587; *Mitchell* v. *Steward*, L. R., 1 Eq. 541; *Dorr* v. *Harrahan*, 101 Mass. 531; 3 Am. Rep. 398; *Arnold* v. *White*, 5 Grant's (U. C.) Ch. 371; *Gass' Appeal*, 73 Penn. St. 48; *McLaughlin* v. *Kelly*, 22 Cal. 211; *Drury* v. *Molins*, 6 Ves. 328; *Pratt* v. *Brett*, 2 Madd. 62.

In all cases of tenancy, the landlord is entitled to compensation for the use of his premises in the form of rent, unless he expressly waives or releases it. Of covenants for its payment we have already spoken. This right to rent is in the tenant's immediate landlord; yet if it be necessary to protect his possession an undertenant may discharge himself by paying to the superior landlord. *Peck* v. *Ingersoll*, 7 N. Y. (3 Seld.) 528.

A grant of the reversion of demised premises carries with it all rent becoming due subsequent to the transfer, though partly earned prior thereto, unless it is reserved or has been transferred to another party with the knowledge of the grantee. *Leonard* v. *Burgess*, 16 Wis. 41. Upon the death of a landlord who is owner in fee, the rent previously due belongs to the executor as assets, and that afterward accruing, to his heir at law. *Cole* v. *Patterson*, 25 Wend. 456; *Sacheverell* v. *Froggatt*, 2 Saund. 367, *a*, *b*; *ante*, Vol. 3, 246.

In the absence of agreement, the law will imply a promise by the tenant to pay as much as the use of the premises is reasonably worth, so long as he occupies without obstruction by the landlord. The effect of an assignment upon this liability has already been stated. A tenant holding over after notice to quit is liable to pay a reasonable compensation (*Stoddard* v. *Waters*, 30 Ark. 156); and one holding over after notice that he cannot retain the premises, without paying an increased rent, will be bound by the new terms, although he objected to them. *Hogsett* v. *Ellis*, 17 Mich. 351; *Griffin* v. *Knisely*, 75 Ill. 411. But see *Meaher* v. *Pomeroy*, 49 Ala. 146. A tenant at will, who continues in possession after a sale of the premises, is liable for rent to the purchaser. *Bunton* v. *Richardson*, 10 Allen, 260.

A tenant who has unqualifiedly covenanted to pay rent cannot resist payment, unless he can show an eviction, a lawful termination of his possession, or an acceptance by the landlord of another tenant.

Gilhooley v. *Washington*, 4 N. Y. (4 Comst.) 217. As a general rule, neither misfortune to the lessee nor the effect of unavoidable accidents to the demised premises, by fire, flood or tempest, not excepted against in the lease, will relieve him. *Hallett* v. *Wylie*, 3 Johns. 44; *Gates* v. *Green*, 4 Paige, 355; *Willard* v. *Tillman*, 19 Wend. 358; *Helburn* v. *Mofford*, 7 Bush (Ky.), 169; *Robinson* v. *L'Engle*, 13 Fla. 482; *Cross* v. *Button*, 4 Wis. 468. The destruction or untenantable condition of the demised premises is, however, by statute in New York, and perhaps elsewhere, made a ground for relief against rent. A condition is also sometimes inserted in leases, that if the premises become untenantable the rent shall cease until they are repaired, and the tenant may take advantage of such condition without leaving the premises. *Kip* v. *Merwin*, 52 N. Y. (7 Sick.) 542.

This liability for rent ceases when the premises are appropriated by right of eminent domain. *Barclay* v. *Picker*, 38 Mo. 143. But a lawful dispossession, by summary proceedings or otherwise, at the instance of the landlord, does not affect his right to rent previously due, or where it was payable in advance, to rent for the time the tenant actually occupied. *May* v. *Diaz*, 42 Ala. 383; *Hinsdale* v. *White*, 6 Hill, 507; *Cushingham* v. *Phillips*, 1 E. D. Smith (N. Y.), 416; *Whitney* v. *Meyers*, 1 Duer (N. Y.), 266.

A rent reserved will be reduced if the landlord fails to fulfill that which was the chief inducement to the hiring, or if part of the premises is lost by the act of God, as by overflow of the sea, or the like. *Tomlinson* v. *Day*, 2 Br. & Bing. 680; *Blair* v. *Claxton*, 18 N. Y. (4 Smith) 529.

Wherever the reversion is severed by the act of the parties or of the law, the rent follows and is apportioned, or in other words, becomes payable to the several assignees according to their respective portions. *Nellis* v. *Lathrop*, 22 Wend. 121; *Cole* v. *Patterson*, 25 id. 456; *Daniels* v. *Richardson*, 22 Pick. 568. But the lessee's assent to the apportionment is necessary, unless it is fixed by agreement between the parties to the assignment, or by the determination of a jury. *Bliss* v. *Collins*, 1 D. & R. 291; S. C., 5 B. & Ald. 876. An apportionment is also to be made where a part of the premises is taken for public use, or is repossessed by the landlord for a forfeiture, or the tenant surrenders, or is evicted from part by title paramount. If such surrender or eviction occurs before any rent is due and payable, there can be no apportionment, but the landlord will lose the entire rent. *Zule* v. *Zule*, 24 Wend. 76; *Wood* v. *Partridge*, 11 Mass. 488.

There are statutes existing, both in England and this country, giving a right to double rent where the tenant willfully holds over after

giving or receiving notice to quit. *Johnstone* v. *Hudlestone*, 7 D. & R. 411; S. C., 4 B. & C. 922; *Soulsby* v. *Neving*, 9 East, 310; *Swinfen* v. *Bacon*, 6 H. & N. 846; S. C., 7 Jur. (N. S.) 897; *Beynroth* v. *Mandeville*, 5 Bush (Ky.), 584. This right will be deemed waived if the landlord subsequently accepts single rent. *Doe d. Cheny* v. *Batten*, Cowp. 243.

There are also statutes giving landlords a lien, usually a first lien, upon the tenant's goods or crops, to secure the payment of rent. *Taliafero* v. *Pry*, 41 Ga. 622; *Toler* v. *Seabrook*, 39 id. 14; *Sevier* v. *Shaw*, 25 Ark. 417; *Givens* v. *Easley*, 17 Ala. 385; *Washington* v. *Williamson*, 23 Md. 244. This lien is generally to be enforced by notice to an officer who has levied on the goods at the suit of a third party, by demand and motion to the court to be paid out of the proceeds, or by action against the officer for removing them without paying rent, or for not paying over. *Reed* v. *Thoyts*, 6 M. & W. 410.

So, a landlord having a lien upon the crop may maintain a special action against a stranger, with notice of the lien, who destroys, removes, or so converts the crop, or changes its character that the landlord cannot enforce his lien. *Hussey* v. *Peebles*, 53 Ala. 432. And see *Fowler* v. *Rapley*, 15 Wall. 328. But, in Alabama, he has no such interest in, or title to crops grown on the rented lands as can be made the subject of a valid mortgage. *Broughton* v. *Powell*, 52 Ala. 123. But see *ante*, Vol. 2, 171.

Another remedy for the collection of rent, and one of very high antiquity, is that of seizing or distraining the tenant's goods, and selling them on reasonable notice. This remedy, as it existed at common law, has been regulated and greatly modified by statutes, wherever it has not been altogether abrogated. Where it still exists, the right to this remedy is inseparable from the reversion, and, except in case of a mere rent charge, it can be exercised without having been specially reserved. *Schuyler* v. *Leggett*, 2 Cow. 660; *Hill* v. *Stocking*, 6 Hill, 277. It exists only where there is an actual demise, and where the rent is fixed and certain, or is capable of being rendered certain by calculation, and is payable, whether in money, produce, or services, at a time certain. *Dunk* v. *Hunter*, 5 B. & Ald. 322; *Valentine* v. *Jackson*, 9 Wend. 302; *Wells* v. *Hornish*, 3 Pen. & W. 30; *Jacks* v. *Smith*, 1 Bay, 315; *Marshall* v. *Giles*, 2 Const. 637; *Clark* v. *Fraley*, 3 Blackf. 264. The remedy is applicable to a holding under a void lease; but not to a case where the landlord can claim only for use and occupation. *Farington* v. *Baley*, 21 Wend. 65.

Nothing can be collected by distress beyond the amount due for rent, without interest or damages, but all arrears of rent can be so col-

lected at the same time. *Lansing* v. *Rattoone*, 6 Johns. 43; *Sherwood* v. *Phillips*, 13 Wend. 479; *Vechte* v. *Brownell*, 8 Paige, 212. Nor is the landlord bound to confine himself to the precise amount of rent due. A mere mistake in judgment as to the value of the property seized, or a want of knowledge of the sum due, cannot render him a trespasser. *Harris* v. *Solem*, 79 Ill. 460.

If the rent is payable in advance, the landlord may distrain immediately upon the tenant's taking possession. *Russell* v. *Doty*, 4 Cow. 576. In other cases, he must wait until the next day after the rent is due. The seizure of the property must be made in the day-time; and it may usually be made by the landlord in person, or by his agent. It must also be made in the name of the person to whom the rent is due; but if he has parted with his whole interest in the premises, he cannot distrain. *Swearingen* v. *Magruder*, 4 H. & McH. 347; *Preece* v. *Corrie*, 5 Bing. 24; *Curtis* v. *Wheeler*, M. & M. 493; *Smith* v. *Day*, 2 M. & W. 684.

The right of distress may be exercised by husband and wife jointly, or by the husband alone, for rents accruing from her lands during coverture; by guardians in their own names; by the executor of a lessor for rent accruing before his death; by a receiver in chancery without special order; or by an assignee of the reversion, but not by a mere assignee of the rent. *Bennett* v. *Robins*, 5 C. & P. 379; *Slocum* v. *Clark*, 2 Hill, 475. A tenant may also distrain against an under-tenant. *Harrison* v. *Guill*, 46 Ga. 427. Formerly the right to distrain was given to mortgagees, in certain cases, but under modern statutes they probably do not retain it. One of several joint-tenants, who is seized for all, may distrain alone for the whole rent; but coparceners before partition must all join. Tenants in common, holding by different titles, must distrain severally, each for his own share; but the survivor of them, where all join in the demise and part die, may distrain for the whole rent. *Robinson* v. *Hofman*, 4 Bing. 562; *Harrison* v. *Barnby*, 5 Term, 246.

At common law, the landlord could only distrain during the term, while his own interest in the land continued and while the tenant remained in possession; but further time has been given by modern statutes. *Knight* v. *Benett*, 3 Bing. 361; *Bukup* v. *Valentine*, 19 Wend. 554; *Webber* v. *Shearman*, 3 Hill, 547. But he cannot do it after he has treated the tenant as a trespasser. *Bridges* v. *Smyth*, 5 Bing. 410; 2 M. & P. 740.

The right to distrain is not extinguished by taking a note, bond or other security for the rent, unless it is expressly taken as payment; nor by an unsatisfied judgment for the amount. *Cornell* v. *Lamb*, 20

Johns. 407; *Lofsky* v. *Maujer*, 3 Sandf. Ch. 69; *Printems* v *Helfried*, 1 N. & McC. 187; *Bailey* v. *Wright*, 3 McC. 484; *Snyder* v. *Kunkleman*, 3 Penr. & W. (Penn.) 487. Nor is it affected by a right to re-enter reserved in the lease, or by a surrender of part of the premises; but a surrender of the whole of the premises extinguishes it, and so does a tender of the rent due at any time before sale, with costs, if proceedings have been commenced. *Hunter* v. *LeConte*, 6 Cow. 728; *Virtue* v. *Beasley*, 1 Mood. & R. 21. A tender, to have that effect must be made to the landlord himself, or to his authorized agent. *Browne* v. *Powell*, 4 Bing. 230; S. C., 12 Moore, 454.

The distress must be made on the premises out of which the rent issues, unless the tenant has fraudulently removed them, in which case the landlord is generally allowed to follow and seize them. *Christman* v. *Floyd*, 9 Wend. 340; *Grace* v. *Shively*, 12 S. & R. 217; *Purfel* v. *Sands*, 1 Ashm. 120. For the purpose of making the seizure, the landlord, or his agent or officer, may enter the house or building through a door or window which is open, but he cannot lawfully break, inclosures or fastenings. Once having entered an open door, he may break an inner door. *Williams* v. *Spencer*, 5 Johns 352; *State* v. *Thackam*, 1 Bay (S. C.), 358.

Being lawfully in, he may seize any of the movable chattels of the tenant, not exempted by law, or one in the name of the whole. *Wood* v. *Nunn*, 5 Bing. 10; 2 M. & P. 27. And, as a general rule, he may distrain goods of a stranger found on the premises, unless they were placed there temporarily for purposes of commerce, but he has no right to take those of a succeeding tenant who has entered under a new demise. *Webber* v. *Shearman*, 6 Hill, 20; *Bell* v. *Potter*, id. 497. Things in actual use are protected from distress, and the statutes on the subject exempt many other things. Things *bona fide* sold cannot afterward be distrained, unless they remain on the premises an unreasonable time. Things in the custody of the law are also exempt.

When taken, the property must ordinarily be removed, the tenant be notified, and a public notice be given before the sale. Meantime the property is held like a pledge, the landlord not being allowed to use it, but being responsible for any injury that may happen to it.

§ 2. **Action for rent.** The proper action for the recovery of rent which was fixed and certain, or was capable of being made certain by calculation, was, under the common law practice, an action of debt. For the recovery of a reasonable compensation for the use of premises, where the demise was not by deed, or where no certain rent was reserved, a form of action was provided by statute, called an action for use and occupation. It is not necessary here to explain the peculiari-

ties of the two forms of action, this article being concerned chiefly with the principles which underlie both.

In the action for rent, if that was made payable in produce, the recovery would be of the value of such produce. Interest on the rent sued for from the time it became due was also recoverable as damages.

An action for rent may be maintained not only by the lessor, but by his assignee of the rent in arrear, or his grantee of the reversion. *Allen* v. *Bryan*, 5 B. & C. 512; *Huerstel* v. *Lorillard*, 6 Robt. (N. Y.) 260; *Anderson* v. *Treadwell*, 1 Edm. S. C. (N. Y.) 201. A purchaser on a foreclosure sale cannot, however, sue for rents accruing between the dates of the sale and his deed. *Cheney* v. *Woodruff*, 45 N. Y. (6 Hand) 98.

A tenant who has sublet, taking covenants for payment of rent to himself, can maintain an action therefor against either the sublessee or his assignee. *Demarest* v. *Willard*, 8 Cow. 206; *Trabue* v. *McAdams*, 8 Bush (Ky.), 74. Tenants in common who join in a lease, reserving an entire rent, may join in a suit therefor, or if one dies, the survivor may sue for the whole rent, but if they make separate demises, or there is a separate reservation to each, they must sue separately. *Wallace* v. *McLaren*, 1 M. & R. 516; *Powis* v. *Smith*, 5 B. & Ald. 850; *Wall* v. *Hinds*, 4 Gray, 256. A landlord who has re-entered for a forfeiture may, nevertheless, sue for rent previously due. *Hartshorne* v. *Watson*, 4 Bing. N. C. 178; S. C., 5 Scott, 506. An action will also lie for double rent, where it is given by statute.

The action may be brought not only against a lessee who is in full possession, but against one who has been evicted by paramount title from a part of the premises; against an assignee of the term, or against an assignee of a part of the premises for the full term. *Stevenson* v. *Lambard*, 2 East, 575. In the latter case, the action may be against the lessee and his assignee jointly. But after a lessor has accepted an assignee of the term as his tenant, his remedy is confined to such assignee and his legal representatives. *McKeon* v. *Whitney*, 3 Denio, 452. For rent subsequent to the death of a lessee, an action will lie against his executor or administrator personally, for the amount received by him. *Miller* v. *Knox*, 48 N. Y. (3 Sick.) 232.

Rent may also be recovered in equity, when the remedy at law is insufficient.

An action for use and occupation will lie only where the relation of landlord and tenant exists, but it makes no difference whether the contract creating that relation is express or implied. *LaFarge* v. *Park*, 1 Edm. S. C. (N. Y.) 223; *Nance* v. *Alexander*, 49 Ind. 516; *Espy* v.

Fenton, 5 Oreg. 423; *Lankford* v. *Green*, 52 Ala. 103. To sustain it, the defendant must have actually taken possession of the premises, either by himself, his agent or his undertenant. *Waring* v. *King*, 8 M. & W. 571; *Bordman* v. *Osborn*, 23 Pick. 295. A mere permissive holding, or a holding under an agreement for a lease, or a void lease, or a contract for a sale which has gone off, is sufficient to sustain the action, and the recovery will be for the time of actual occupation, or, in the latter case, for such time after the contract went off. *Codman* v. *Jenkins*, 14 Mass. 93; *Blume* v. *McClurken*, 10 Watts, 380; *Warner* v. *Hale*, 65 Ill. 395; *Howard* v. *Shaw*, 8 M. & W. 118; *Little* v. *Pearson*, 7 Pick. 301.

This action will lie for the use of incorporeal as well as corporeal hereditaments, as, for tolls, stallage, a fishery or a water-course. *Bird* v. *Higginson*, 4 N. & M. 505; 2 A. & E. 696. It is also available to collect a balance of rent not collected by distress.

Not only may the action be brought by the lessor, while holding the reversion, but he can maintain it after assigning the reversion, if he reserved the rent due; and his assignee of the reversion can sue for an occupation after notice of his rights; and an heir of the lessor can sue a tenant holding over. *Birch* v. *Wright*, 1 Term R. 378; *Hunt* v. *Wolfe*, 2 Daly (N. Y.), 298. But an agent of the lessor cannot sue in his own name; nor can a *cestui que trust*, or one claiming under him, where the letting was by the trustee. *Morgell* v. *Paul*, 2 M. & R. 303; *Harris* v. *Booker*, 12 Moore, 283; 4 Bing. 96; *Evans* v. *Evans*, 3 A. & E. 132.

It will lie against the lessee or his assignee of the term, against his trustees in an assignment for the benefit of creditors, though not in occupation of the premises; or against his assignees in bankruptcy, or his personal representatives, actually occupying them; against a tenant holding over, for the use after the expiration of his term; or against a tenant who quits possession without a regular determination of his lease, and without acceptance of another tenant by the landlord. *Harding* v. *Crethorn*, 1 Esp. 57; *Van Brunt* v. *Pope*, 6 Abb. (N. S. N. Y.) 217; *Boston, etc., R. R. Co.* v. *Ripley*, 13 Allen, 421; *Graham* v. *Whichelo*, 1 C. & M. 188; *Walls* v. *Atcheson*, 3 Bing. 462.

A consent by the landlord to the termination of a tenancy between the stated times, fixed for the payment of rent, will prevent his recovering for the time occupied subsequent to the last of such periods. *Hall* v. *Burgess*, 5 B. & C. 332. He cannot recover for the use of any part of the premises, after he has evicted the tenant from a part thereof, while such eviction continues (*Lawrence* v. *French*, 25 Wend. 443); nor for use subsequent to the demise laid in an ejectment by

which he has recovered possession (*Birch* v. *Wright*, 1 Term R. 378); nor for use after the commencement of proceedings for re-entry against a tenant holding over. *Powers* v. *Witty*, 42 How. Pr. (N. Y.) 352; S. C., 4 Daly, 552; *Featherstonhaugh* v. *Bradshaw*, 1 Wend. 134.

Breaches of covenant on the part of the lessor are no defense to such actions; but the damages occasioned thereby may usually be set up to reduce the recovery, by way of recoupment or of counter-claim. *Watts* v. *Coffin*, 11 Johns. 495; *Cook* v. *Soule*, 56 N. Y. (11 Sick.) 420; *Kelsey* v. *Ward*, 38 N. Y. (11 Tiff.) 83. Neither is the destruction of the premises, or their unhealthy or untenantable condition, a defense. *Baker* v. *Holtzapffell*, 4 Taunt. 45; *Bussman* v. *Ganster*, 72 Penn. St. 285; *Coy* v. *Downie*, 14 Fla. 544.

An eviction from the whole or a material part of the premises by the landlord is a defense as to the whole rent, so long as such eviction continues; but an eviction from a part by title paramount, only entitles to an apportionment of the rent. *Burn* v. *Phelps*, 1 Stark. 94; *McClurg* v. *Price*, 59 Penn. St. 420; *Wolf* v. *Weiner*, 7 Phil. (Penn.) 274; *Holmes* v. *Guion*, 44 Mo. 164; *Tunis* v. *Grandy*, 22 Gratt. (Va.) 109; *Hayner* v. *Smith*, 63 Ill. 430; 14 Am. Rep. 124.

Infancy of the lessee at the time of executing the lease is no defense, if the lease is beneficial and was not waived before rent day. Where the premises were demised at an entire rent, it is a good defense that the lessee was not let into full possession. *Holgate* v. *Kay*, 1 C. & K. 341.

Payment or tender of the rent, either in money or in any other way provided by the agreement; a levy of the whole amount due by distress and sale; or any compulsory payment made for the benefit of the landlord may also be set up as defenses. *Sapsford* v. *Fletcher*, 4 Term R. 511; *Taylor* v. *Zamira*, 6 Taunt. 524; *Carter* v. *Carter*, 5 Bing. 406; 2 M. & P. 723. Where the lessors are joint tenants, payment to one of them is a good defense. *Robinson* v. *Hofman*, 1 M. & P. 474; S. C., 4 Bing. 562; 3 C. & P. 234.

A surrender in fact, and delivery of possession to and its acceptance by the landlord, is also a good defense. *Elliott* v. *Aiken*, 45 N. H. 30; *Page* v. *Ellsworth*, 44 Barb. 636.

The estoppel against disputing the title of the landlord does not prevent the tenant from setting up that such title ended before the rent sued for accrued; but so long as he remains in undisturbed possession he cannot set up that defense. *Lamson* v. *Clarkson*, 113 Mass. 348; 18 Am. Rep. 498; *Hardy* v. *Akerly*, 57 Barb. 148.

It is also a good defense that the premises, or part of them, are occupied for an immoral purpose, with the knowledge or assent of the

landlord. *Townsend* v. *Gilsey*, 7 Abb. (N. S. N. Y.) 59; S. C., 1 Sweeney, 155.

§ 3. **Action of covenant.** This ancient remedy was applicable to the recovery of damages for the breach of any covenant or agreement, express or implied, in an instrument under seal; and especially where the damages are unliquidated. As the action depended upon privity of contract, it could be brought only by one who was a party to the instrument, or was expressly included by its terms. It was the only remedy remaining to a landlord against his tenant, after the latter had assigned; the tenant being liable always, but the assignee only while he holds as such. After assigning the reversion, the landlord could still sue for arrears of rent, or for breaches of other covenants prior to the assignment; but the right of action for subsequent breaches was in the assignee. These general principles still prevail, whatever statutory form the action may have assumed in modern times. But it is unnecessary to further pursue these remarks, as the subject has been already considered. See Vol. 2, p. 353.

§ 4. **Action of waste.** Voluntary waste is any spoil or destruction in houses, lands or tenements, arising from some positive act, and causing permanent injury to the inheritance. Permissive waste is a like injury, arising from a neglect to do what might have prevented it. Local custom to some extent enters into the determination of what is waste, but, as a general rule, such acts as the cutting of fruit or ornamental trees, or of those planted for the protection of banks, or of building timber, except that needed for immediate use in making necessary repairs and improvements, or for fuel; the opening of new mines not contemplated by the lease; the digging or carrying away of stone, or soil, or the using of clay for brick making; the changing the use of different parcels of land, to the injury of the lessor; the pulling down or materially altering of buildings; the breaking or carrying away of glass windows; the destroying of dove cotes, parks, warrens, or fish ponds, and the like, are to be deemed voluntary waste. *Freer* v. *Stotenbur*, 34 How. (N. Y.) 440; 2 Abb. Ct. App. 189; 2 Keyes, 467; *Watherell* v. *Howells*, 1 Camp. 227; *Simmons* v. *Norton*, 5 M. & P. 645; 7 Bing. 640; *Livingston* v. *Reynolds*, 2 Hill, 157.

An omission to keep the demised premises in tenantable repair; and negligence in suffering them to be overflowed or surrounded by water, or destroyed by fire, are permissive waste. In new and wooded countries, however, it is not deemed waste to clear land for agricultural uses, a sufficiency of timber being left standing for the farm. *Keeler* v. *Eastman*, 11 Vt. 293; *Findlay* v. *Smith*, 6 Munf. (Va.) 134. Nor

is it waste to continue to dig in mines or pits already open, the products of which have become part of the annual profits of the lands.

The special action of waste, given by the common law, has fallen into disuse as a remedy for voluntary waste, and an action on the case has, to a considerable extent, taken its place. Substantially the same remedy is given in actions brought under the codes of New York and other States.

Originally the action of waste could be brought only by the immediate reversioner having a freehold estate, but by statute in New York and some other States it may now be maintained by any person seized of an estate in remainder or reversion, notwithstanding an intervening life estate; and he can maintain it, even though before suit brought he alienates the estate. The heir of a lessor may sue for waste committed in the time of his ancestor.

In the absence of special agreement, a lessee is liable to his lessor for all waste, by whomsoever committed, and may have his action over against the actual wrong-doers. *Cook* v. *Champlain Trans. Co.*, 1 Denio, 91; *Parrott* v. *Barney*, 2 Abb. (U. S.) 197. This rule does not apply to a tenant at will or by sufferance. *Coale* v. *Hannibal, etc., R. R. Co.*, 60 Mo. 227. The executor or administrator of a lessee is liable to an action for waste committed by himself, but not for that committed by his decedent, except so far as it has benefited the personal estate. *Hambly* v. *Trott*, Cowp. 376.

The action will also lie against a guardian, a tenant by curtesy or in dower, or any tenant for life or years, or his assigns. It will also lie against a tenant who, after letting or granting his estate, still retains possession and commits waste. Joint tenants and tenants in common are liable to their co-tenants for waste committed by themselves. It is now held that a tenant for years or from year to year is not liable to an action for permissive waste, unless he has covenanted to repair. *Herne* v. *Bembow*, 4 Taunt. 764.

An action at law furnishes a remedy only for waste already committed, but equity supplements it by restraining the commission of waste. The latter remedy will not be granted, however, unless there are clear grounds for it, in an actual attempt, or serious threats; nor where the plaintiff's title is denied. *Gibson* v. *Smith*, 2 Atk. 182; *Lord de Wilton* v. *Saxon*, 6 Ves. 106; *Pillsworth* v. *Hopton*, id. 51. See Vol. 3, 694–700, tit. *Injunctions*.

§ 5. **Ejectment.** This remedy for the recovery of the possession of demised premises after the expiration or termination of the tenancy, has been so fully treated under the title "Ejectment" (Vol. 3, p. 1, etc.), that nothing further need be said here on the subject.

ARTICLE XI.

TENANTS' REMEDIES.

Section 1. In general. As between two co-tenants, both equally bound to repair, if one refuses to join the other in making necessary repairs, after reasonable notice, the latter may make them himself, and charge his co-tenant.

For breaches of covenant by his landlord, a tenant may either maintain an action of covenant against him, or he may recoup his damages in an action for the rent. *Tibbits* v. *Percy*, 24 Barb. 39; *Whitbeck* v. *Skinner*, 7 Hill, 53; *Mayor, etc., of N. Y.* v. *Mabie*, 13 N. Y. (3 Kern.) 151. He may also, in such an action, recoup for fraud on the part of the landlord. *Whitney* v. *Allaire*, 1 N. Y. (1 Comst.) 305. For a wrongful withholding of the possession of the premises by his landlord or a stranger, when he is entitled to enter, he may either bring ejectment, or sue on the covenant for quiet enjoyment. *Trull* v. *Granger*, 8 N. Y. (4 Seld.) 115; *Berrington* v. *Casey*, 78 Ill. 317.

If demised lodgings are unfit for occupation when the tenant takes them, by reason of vermin or nuisances, he may leave them; but ordinarily a tenant cannot do so unless there was some fraud on the part of the landlord. *Surplice* v. *Farnsworth*, 7 M. & G. 576; S. C., 8 Scott N. R. 307.

If a landlord refuses to perform an agreement to execute a lease, or a covenant to renew, the tenant, having substantially performed on his part, can enforce specific performance, by action for that purpose. *Walker* v. *Walker*, 2 Atk. 100; *Owen* v. *Davies*, 1 Ves. 83; *Setton* v. *Slade*, 7 id. 265; *Arnot* v. *Alexander*, 44 Mo. 25; *Reed* v. *St. John*, 2 Daly (N. Y.), 213; *Williams* v. *Evans*, L. R., 19 Eq. 547; 13 Eng. Rep. 490; S. C., 44 L. J. Ch. 319; 23 W. R. 466; *Cole* v. *White*, cited in 1 Bro. C. C. 409; *Grant* v. *Ramsey*, 7 Ohio St. 165; *Foxcroft* v. *Lester*, 2 Vern. 456.

Want of a sufficient and reasonable consideration for the agreement; fraud or misrepresentation in procuring it; willful breaches of the covenants to be inserted in a new lease; insolvency, or felony, or the commission of waste, on the part of the person seeking a renewal of his lease, are sufficient grounds for refusing specific performance. *Redshaw* v. *Bedford Level*, 1 Eden, 346; *Dowling* v. *Mill*, 1 Madd. 541; *Robertson* v. *St. John*, 2 Bro. C. C. 140; *Pendred* v. *Griffith*, 1 Bro. P. C. 314; *Willingham* v. *Joyce*, 3 Ves. 169; *Hill* v. *Barclay*, 18 id. 63; *Neale* v. *Mackenzie*, 1 Keen. 474. See "*Specific Performance.*"

§ 2. **Replevin.** This is a form of action adapted to the recovery of the possession of personal property which has been wrongfully taken or detained, and the one usually resorted to in former times for the trial of the legality of a distress. It would also lie for any tortious or unlawful taking, as, where there was no rent due, or not so much as was distrained for, or for a distress after a tender made, or for a distress of exempt or privileged goods. *Connah* v. *Hale*, 23 Wend. 462; *Perreau* v. *Bevan*, 5 B. & C. 284; *Hamilton* v. *Windolf*, 36 Md. 301; 11 Am. Rep. 491; *Sassman* v. *Griffith*, 7 Phil. (Penn.) 159. See title "*Replevin.*"

§ 3. **Trespass.** A tenant in the actual possession of demised premises is entitled to a remedy for all unlawful entries upon or injuries to them which affect his rights, as well as for all injuries to his rights in personal property. An action of trespass was the proper remedy at common law, for all forcible or immediate injuries to such property or rights. An action of the same nature may be brought under the codes of New York and other States, and it will be governed by substantially the same principles. Those principles are stated at large under the title "*Trespass.*"

Among the injuries for which a tenant may maintain trespass are, an entry upon the demised premises without leave, express or implied, by a person or by his cattle, for any purpose, even for that of removing his property; a continuance on the premises after a request to leave; injuries to the dwelling, rendering it uncomfortable or untenantable; or to the land by overflowing it, or to a way by obstructing it; or to fences by throwing them down; cutting down fruit, shade or ornamental trees; erecting a building so near the demised premises as to throw the eaves drip on them, or obstruct the access of light to them; or erecting a nuisance so near as to injuriously affect the air. *Barker* v. *Barker*, 3 C. & P. 557; *Foster* v. *Elliott*, 33 Iowa, 216; *Frout* v. *Hardin*, 56 Ind. 165.

If the injury affects the reversion, both landlord and tenant may sometimes bring separate actions; but, as a general rule, a landlord cannot maintain trespass when another person is in the actual possession of the premises, unless he placed him there as his agent. *Shadwell* v. *Hutchinson*, 4 C. & P. 333; *Thurston* v. *Hancock*, 12 Mass. 220; *Davis* v. *Clancy*, 3 McCord (S. C.), 422.

A tenant for years can maintain this action against his landlord as well as against a stranger; but a tenant at will or sufferance cannot do so, even though violently dispossessed. *Faulkner* v. *Alderson*, Gilm- (Va.) 221; *Hyatt* v. *Wood*, 4 Johns. 150. An assignee of a tenant's interest in crops can sue in trespass for an injury thereto. *Carter* v. *Jarvis*,

9 Johns. 143. Even a party in possession under a mere parol license can maintain trespass for a wrongful entry. *Graham* v. *Peat*, 1 East, 246; *Lewis* v. *Ponsford*, 8 C. & P. 687; *Wilber* v. *Paine*, 1 Ohio, 251.

An entry given by law, such as one to see that the tenant keeps the premises in repair, or to levy a distress, is a trespass only when it is abused, and then it becomes one from the beginning. *Allen* v. *Crofoot*, 5 Wend. 506; *Oxley* v. *Watts*, 1 Term R. 12. But if a landlord removes his tenant, lawfully in possession, otherwise than by due process of law; or distrains when there is no rent due, or after a tender duly made; or seizes exempt or privileged property; or enters an outer door which is shut, for the purpose of distraining; or distrains twice for the same rent when there was a sufficient distress on the premises at the first time, unless he was mistaken as to its value, he is directly liable to the tenant in trespass. *Nowlan* v. *Trevor*, 2 Sweeney, 67; *Batterson* v. *Ferguson*, 5 N. Y. Leg. Obs. 100; *Ward* v. *Ventom*, Peake's Add. C. 126; *Moore* v. *Beamont*, 6 Term, 138; *Smith* v. *Goodwin*, 4 B. & Ad. 413; *Virtue* v. *Beasley*, 1 Mood. & R. 21; *Hutchins* v. *Chambers*, 1 Burr. 589. And see *Williams* v. *Cleaver*, 4 Houst. (Del.) 453. A mere irregularity in the proceedings for a distress, however, does not render him so liable.

A lodger, whose goods are distrained by the superior landlord, can maintain either trespass or case; and in the case of an abuse of a distress, as well as in many other cases, the tenant may waive the trespass and sue in case.

The mortgagee of a crop may, after the maturity of his rights under the mortgage, maintain trover against the owner of the land who takes possession of the crop and converts it for the rent. *Robinson* v. *Kruse*, 29 Ark. 575. If a landlord remove his tenant during the term by entering and holding possession, because the house is used as a place of prostitution, and kept in a disorderly manner, he cannot plead nor prove these facts in justification of his trespass in an action brought against him by the tenant. *Miller* v. *Forman*, 37 N. J. Law, 55.

§ 4. **Action on the case.** As stated in the chapter devoted to this subject (Vol. 2, 99), this is the appropriate remedy for any injury to the person or to personal rights, when such injury is not direct, immediate and with force, but consequential merely. A tenant may bring case for an excessive distress or an irregular sale (*Messing* v. *Kemble*, 2 Camp. N. P. C. 115; *Field* v. *Mitchell*, 6 Esp. 71; *Marquissee* v. *Ormston*, 15 Wend. 368); for the erection or continuance of a nuisance of any kind by the landlord or a third party near the tenant's dwelling (*Alston* v. *Grant*, 3 E. & B. 128; 2 C. L. R. 933); or for a disturbance of incorporeal property, such as franchises, rights of com-

mon, or of private way, or other easement; for a neglect to repair a way, by a party bound so to do (*Seneca R. R.* v. *Auburn R. R. Co.*, 5 Hill, 170); or for obstructing the tenant's use of the door bell, knocker, sky-light, or water-closet, belonging to the premises. *Underwood* v. *Burrows*, 7 C. & P. 26; *Wilson* v. *Smith*, 10 Wend. 324; *Browning* v. *Dalesme*, 3 Sandf. (N. Y.) 13.

The action will also lie if the landlord lets a house which he knows to be infected with a contagious disease, without disclosing that fact, and the tenant takes such disease. *Minor* v. *Sharon*, 112 Mass. 477; S. C., 17 Am. Rep. 122; *Cesar* v. *Karutz*, 60 N. Y. (15 Sick.) 229; S. C., 19 Am. Rep. 164.

If a tenant of rooms beneath those occupied by the landlord suffers damage by reason of the leakage of injurious substances from the rooms above, through want of repair or negligence on the part of the landlord, he can sue in case therefor (*Stapenhorst* v. *Am. Manf. Co.*, 46 How. Pr. [N. Y.] 510; S. C., 15 Abb. [N. S.] 355; 4 J. & Sp. 392; *ante*, p. 262); but one tenant cannot sue his co-tenant for damages, caused by inherent defects in the premises, although the latter is bound to the landlord to repair. *Martin* v. *Washburn*, 23 La. Ann. 427.

§ 5. **Forcible entry and detainer.** Under the statutes now generally prevailing, persons disseized of lands are strictly forbidden to enter thereon for the purpose of regaining possession, except in cases where an entry is given by law, and then such entry must be peaceable and not with strong hand or multitude of people. The remedy known as forcible entry and detainer is one expressly provided by law for restoring a person to possession who has been forcibly removed, and for punishing the wrong-doer. Its nature, extent and application to the case of tenants has already been sufficiently explained. See Vol. 3, 395–406.

§ 6. **Eviction.** A brief view of the nature and effect of an eviction as between landlord and tenant is all that need be given here, the subject in its general application having been considered *ante*, Vol. 3, pp. 46–65.

The taking from a tenant of the whole or any part of the demised premises of which he has been in possession, or of something which he was entitled to enjoy in connection therewith, is an eviction. *Etheridge* v. *Osborn*, 12 Wend. 529. An actual entry or physical exclusion of the tenant is not necessary to constitute it, but any obstruction or interruption by the landlord of his beneficial enjoyment of the thing demised, and on which rent is reserved, is sufficient. Thus, the erection of a nuisance near the premises; the use of parts of the same building for a house of prostitution; or even petty annoyances, injuri-

ous to the tenant's business and destructive to the comfort of his family, may be sufficient. *Dyett* v. *Pendleton*, 8 Cow. 727; *Cohen* v. *Dupont*, 1 Sandf. (N. Y.) 260; *Watts* v. *Coffin*, 11 Johns. 495. But it is held that repeated entries by the lessor, and carrying away of crops, cutting down a fruit tree, and removing a cooking stove from the house, though acts of trespass, do not amount in law to an eviction of the tenant. *Bartlett* v. *Farrington*, 120 Mass. 284.

An actual wrongful eviction of a tenant, or withholding of possession from him, by the landlord, relieves him from the payment of rent while out of possession; and a constructive eviction will have the same effect, if the tenant abandons the possession in consequence of it. *Hunt* v. *Cope*, Cowp. 242; *Christopher* v. *Austin*, 11 N. Y. (1 Kern.) 216; *Kessler* v. *McConachy*, 1 Rawle, 435; *Edgerton* v. *Page*, 20 N. Y. (6 Smith) 281; *Briggs* v. *Hall*, 4 Leigh (Va.), 484; *Mirick* v. *Hoppin*, 118 Mass. 582; *Jackson* v. *Eldy*, 12 Mo. 209.

An eviction by title paramount does not have that effect, but the rent may be apportioned. *Lansing* v. *Van Alstyne*, 2 Wend. 561; *Folts* v. *Huntley*, 7 id. 210. Nor does a constructive eviction by the superior landlord relieve undertenants from liability to their immediate landlord. *Luckey* v. *Frantzkee*, 1 E. D. Smith (N. Y.), 47. See *Camarillo* v. *Fenlon*, 49 Cal. 202.

The law also gives a tenant who is wrongfully dispossessed before the expiration of his term a positive remedy, in an action for a breach of the covenant of quiet enjoyment, or one for the recovery of damages. He may recover as damages the difference between the stipulated rent and the value of the unexpired term, and any extra damages arising from the season of the year when it occurs. *Chatterton* v. *Fox*, 5 Duer (N. Y.), 64. In a case of eviction from a livery and boarding stable, loss of profits was given as a part of the damages. *Shaw* v. *Hoffman*, 25 Mich. 162. But the enhanced value of premises will not be given unless it was caused by improvements made by the tenant himself. *Ricketts* v. *Lostetter*, 19 Ind. 125.

Where the landlord leases premises to a tenant by a parol lease, and afterward, and before the tenant gets possession, leases the same premises to another and puts him in possession, the first tenant may either bring an action of ejectment and recover the possession, or he may sue in assumpsit for the breach of the implied covenant for possession and quiet enjoyment. *Berrington* v. *Casey*, 78 Ill. 317.

A tenant who was induced to build on the premises by false and fraudulent representations on the part of the landlord, and was evicted by title paramount, has been held entitled to recover the necessary costs of removing his building and of renting another lot of equal

rental value for the remainder of the term. *Wilson* v. *Raybould*, 56 Ill. 417. A tenant who has paid rent in advance, if dispossessed by the lawful removal of his building, may recover back a proportionate share of the rent so paid. *Noyes* v. *Anderson*, 1 Duer (N. Y.), 342.

§ 7. **Illegality.** The rule that illegality in a contract renders it void applies as well to leases as to other contracts. The illegality of a lease may consist in its being against public policy, as where it is in total or unreasonable restraint of trade, in its being founded upon an illegal or immoral consideration, such as usury, marriage brokage, and the like, or in the premises being let to be used for an illegal or immoral purpose, as for purposes of prostitution, or for a prohibited trade.

The remedy given to the tenant in such cases is chiefly of a negative character. The law considers such leases so tainted that it will not permit an action to be sustained thereon, and hence allows the tenant to set up the illegality as a defense. *Jennings* v. *Throgmorton*, R. & M. 251; *Girardy* v. *Richardson*, 1 Esp. 13; *Smith* v. *White*, L. R., 1 Eq. 626; S. C., 36 L. J. Ch. 454.

Leases have, however, been set aside in equity, because forced upon tenants in connection with a usurious loan. *Molloy* v. *Irwin*, 1 Sch. & Lef. 310.

CHAPTER LXXXIX.

LIBEL.

TITLE I.

OF LIBELS IN GENERAL.

ARTICLE I.

WHAT CONSTITUTES A LIBEL.

Section 1. Definition. Libel in admiralty practice is a pleading addressed to the judge of the court setting forth the party's claim clearly and concisely, closing with a prayer for process and relief, signed and sworn to by the party, and presented to the clerk of the court with security when required. Benedict's Admr. Pr., § 366; *Hutson* v. *Jordan*, 1 Ware, 393. In ecclesiastical law it is the plaintiff's petition or allegation, containing a statement of the complainant's ground of complaint, corresponding with a declaration at common law, and a bill in equity. Bouv. L. Dict., tit. Libel; 3 Bl. 100.

The term "libel" is most generally applied to defamatory and illegal representations, and it is in this sense that it will be treated in what follows.

A libel may be defined as malicious defamation, either written or printed, charging or imputing to another that which renders him liable to punishment, or tends to injure his reputation in the common estimation of mankind, or to hold him up as an object of hatred, scorn, ridicule or contempt. *Cary* v. *Allen*, 39 Wis. 481. But it has also a broader signification and may consist of defamation expressed by signs, as by erecting a gallows at a man's door, or by drawing or painting him in a shameful and ignominious manner. Where the scandal tends to lessen a person in the estimation of the community, it is not necessary that this result should actually follow the publication, but it must be calculated from its language and tenor to do so. *Com.* v. *Odell*, 3 Pittsb. (Penn.) 449. To constitute the offense, the calumnious matter must have been communicated to some third person. *Woodard* v. *Dowsing*, 2

Mann. & Ryl. 74; *Com.* v. *Clap*, 4 Mass. 163; *Layton* v. *Harris*, 3 Harr. (Del.) 406; *Miller* v. *Butler*, 6 Cush. 71; *Johnson* v. *Stebbins*, 5 Ind. 364; *Cary* v. *Allen*, 39 Wis. 482; *Lick* v. *Owen*, 47 Cal. 252. Personal ill-will to the party libeled is not essential. *Com.* v. *Odell*, 3 Pittsb. 449. Libel is deemed aggravated scandal from the fact that it is presumed to have been entered upon with coolness and deliberation, and to last longer and spread further than spoken scandal. *DuBost* v. *Beresford*, 2 Camp. 511.

Although to constitute a libel there must have been a corrupt or malicious intention in the libeler, yet in the absence of an excuse for the publication which the law recognizes, such an intention will be presumed, and the offender is liable to an action for damages at the suit of the party injured. *Dexter* v. *Spear*, 4 Mason (C. C.), 115; *Armentrout* v. *Moranda*, 8 Blackf. (Ind.) 426; *Curtis* v. *Mussey*, 6 Gray, 261. Words which on their face appear to be harmless may, under certain circumstances, convey a covert meaning wholly different from the ordinary and natural interpretation usually put upon them. To render such words actionable it is necessary for the plaintiff to aver and prove that the author of the libel intended them to be understood, and that they were in fact understood by those who read them, in their covert sense. *Rice* v. *Simmons*, 2 Harr. (Del.) 417; *State* v. *Neese*, 2 Tayl. (N. C.) 270; *Croswell* v. *Weed*, 25 Wend. 621. And see *Brennan* v. *Tracy*, 2 Mo. App. R. 540.

Abusive words, which, if spoken only, would not be actionable, may become so when written or printed and published. Thus: merely to say of another that he is a rogue and rascal, or a swindler, would not render the offender liable to prosecution, unless spoken of the person in his trade or business. But such words, when published and circulated in writing or print, are actionable *per se*. *Villers* v. *Monsley*, 2 Wils. 403; *Ford* v. *Johnson*, 21 Ga. 399; *Savile* v. *Jardine*, 2 H. Bl. 532; *Chase* v. *Whitlock*, 3 Hill, 139; *Neil* v. *Altenhofen*, 26 Wis. 708. And it is no defense to an action for a libel that it was published as hearsay, or that the plaintiff first stated the same thing; for there is a great difference between a man's telling a ludicrous story of himself to his acquaintance, and a publication of it to the world. *Cook* v. *Ward*, 6 Bing. 415; *Schenck* v. *Schenck*, 1 Spencer (N. J.), 208.

§ 2. **What publications are libelous.** Every publication, either by writing, printing or pictures, which charges upon or imputes to another disgraceful or dishonest conduct, or which is injurious to his private character or credit, or which tends to render him ridiculous or contemptible, or to make him feared, or his society shunned, is *prima*

facie a libel. *White* v. *Nicholls*, 3 How. (U. S.) 266; *Atwill* v. *Mackintosh*, 120 Mass. 177.

The following are a few of the numerous examples of libel to be found in the reported cases: Charging an attorney with offering himself as a witness in order to divulge the secrets of his clients (*Riggs* v. *Denniston*, 3 Johns. Cas. 198); or a commissioner of bankruptcy with being a misanthrope, a partisan, stripping the unfortunate debtors of every cent, and then depriving them of the benefit of the act (id.); imputing to a landlord that he colluded with an insolvent tenant (*Haire* v. *Wilson*, 9 B. & C. 645); writing of another that he smuggled goods into the country (*Stilwell* v. *Barter*, 19 Wend. 487); imputing to a physician of character and eminence that he was concerned in vending quack medicines (*Clark* v. *Freeman*, 11 Beav. 117); charging a brewer with using filthy and disgusting water in the malting of grain for brewing (*Turrill* v. *Dolloway*, 17 Wend. 426); writing of a publisher of a newspaper that he was a libelous journalist, of a tradesman that he knowingly sold bad commodities, or of a manufacturer that he was a poor workman and unable to turn out good articles (*Wakley* v. *Cooke*, 4 Exch. 518; *Harman* v. *Delany*, 2 Str. 898); charging that a member of congress was a fawning sycophant, a misrepresentative in congress, and a groveling office-seeker, and that he had abandoned his post in congress in pursuit of office (*Thomas* v. *Croswell*, 7 Johns. 264); describing a man as an infernal villain or an itchy old toad, or as being in insolvent circumstances and unable to pay his debts, or as a mere man of straw, unfit to be trusted with money, or guilty of ingratitude to his friends and benefactors, or of misconduct in office, or of general misconduct, corruption, or neglect of duty in the management of business intrusted to him (*Bell* v. *Stone*, 1 Bos. & Pull. 331; *Villers* v. *Monsley*, 2 Wils. 403; *Metrop. Saloon Omnibus Co.* v. *Hawkins*, 4 H. & N. 87; *Eaton* v. *Johns*, 1 Dowl. [N. S.] 62; *Cheese* v. *Scales*, 10 M. & W. 488; *Cox* v. *Lee*, L. R., 4 Exch. 284); publishing of another that he has been guilty of gross misconduct, and has insulted two females and a gentleman in the most bare-faced manner (*Clement* v. *Chivis*, 9 B. & C. 176); writing of another that he is a drunkard (*Giles* v. *State*, 6 Ga. 276; *Sanderson* v. *Caldwell*, 45 N. Y. [6 Hand] 398; S. C., 6 Am. Rep. 105); or insane (*Southwick* v. *Stevens*, 10 Johns. 443; *Perkins* v. *Mitchell*, 31 Barb. 461; *Morgan* v. *Lingen*, 8 L. T. [N. S.] 800); charging another with being deprived of a participation in the chief ordinance of the church to which he belongs by reason of his infamous groundless assertions (*McCorkle* v. *Binns*, 5 Binn. [Penn.] 340); publishing of a judge that he lacks capacity, that he has abandoned the common principles of truth,

that he has made the office of clerk a subject of private negotiation between men to whom he is under personal obligation, and is endeavoring to cancel those debts by a barter of office (*Robbins* v. *Treadway*, 2 J. J. Marsh. [Ky.] 540); writing of a person that he is about to commence an action for a libel, but that he will not like to bring it to trial in a particular county because he is known there (*Cooper* v. *Greeley*, 1 Denio, 347); stating, in the criticism of a book, that the motives of the author are dishonorable or disreputable (*Cooper* v. *Stone*, 24 Wend. 434); imputing to a person the want of official integrity, and charging that in his official capacity he was induced by a pecuniary or valuable consideration to act in a particular manner upon matters which came before him (*Wilson* v. *Noonan*, 23 Wis. 105); publishing of a candidate that he bartered a public improvement in which his constituency were interested for the charter of a bank to himself and his associates, that if elected he will be an unfaithful representative, and that he will, by criminal indifference or treachery, delay or defeat such improvement, in order to accomplish selfish, sinister and dishonest purposes (*Powers* v. *Dubois*, 17 Wend. 63); writing of a man, "I look upon him as a rascal, and have watched him for many years" (*Williams* v. *Karnes*, 4 Humph. [Tenn.] 9); or of a person that he is thought no more of than a horse thief and counterfeiter (*Nelson* v. *Musgrave*, 10 Mo. 648); publishing of a juror that he agreed with another juror to rest the determination of the amount of damages in a case under their consideration on a game of draughts (*Com.* v. *Wright*, 1 Cush. 46); or of a person, that he refused to correct the statement of a witness who was testifying before a magistrate, when he knew that it was not true (*Coombs* v. *Rose*, 8 Blackf. [Ind.] 155); charging another with knowingly assisting in a swindling enterprise (*Williams* v. *Godkin*, 5 Daly [N. Y.], 499); or a politician, that, influenced by a bribe, he offered a resolution at a nominating convention that no nomination of a candidate for a particular office should be made (*Hand* v. *Winton*, 38 N. J. Law, 122); falsely and maliciously publishing of a person that he is living in poverty and extreme destitution. *Moffatt* v. *Cauldwell*, 5 T. & C. (N. Y. Sup.) 256; S. C., 3 Hun, 26.

Where a letter was addressed to the wife of another man, insinuating that she had acted libidinously toward him, had invited him to an adulterous intercourse with her, and had sought opportunities to effect it; and it appeared that the letter was written and sent with intent to abuse and insult her, to seduce her affections from her husband, entice her to commit adultery, and to bring her into hatred and contempt; it was held that it constituted a libel. *State* v. *Avery*, 7 Conn. 266. A statement in a newspaper that a ship, of which the plaintiff was owner

and master, and which he had advertised for a voyage, was not a seaworthy ship, and that Jews had bought her to take out convicts, was held to be a libel for which an action might be maintained, without proving malice or alleging special damage. *Ingram* v. *Lawson*, 6 Bing. (N. S.) 212; S. C., 5 id. 66. A publication which characterizes a verdict as infamous, and states that the writer cannot express the contempt which should be felt for those twelve men who have thus not only offended public opinion, but have done injustice to their oaths, is a libel on the jurors individually. *Byers* v. *Martin*, 2 Col. 605.

The general rule is, that it is libelous *per se*, to impute to a person in his official capacity, profession, trade, or business, any kind of fraud, dishonesty, misconduct, incapacity, or unfitness, notwithstanding the person libeled is not then in the actual enjoyment of his office, trade, or business, and although the trade or calling is not one of which the court can take judicial notice, if it be shown that the defamation or matter was published of the plaintiff, with reference to that trade or calling. *Ingram* v. *Lawson*, 6 Bing. (N. S.) 212; *Boydell* v. *Jones*, 4 M. & W. 450; *Foulger* v. *Newcomb*, L. R., 2 Exch. 327; *Gage* v. *Robinson*, 12 Ohio, 250; *Cramer* v. *Riggs*, 17 Wend. 209; *Croswell* v. *Weed*, 25 id. 621. A publication which holds a person up to the public as wanting in the qualities and characteristics of a merchant of integrity and honor is actionable, although it relates to the conduct of such person, in a transaction which was unlawful, if he acted therein in conformity to what he supposed to be the law and usage in similar cases. *Chenery* v. *Goodrich*, 98 Mass. 224.

Scandal expressed in allegory or irony may amount to a libel (*Peake* v. *Oldham*, Cowp. 275; *Woolnoth* v. *Meadows*, 5 East, 463; *Hillhouse* v. *Dunning*, 6 Conn. 391); such as imputing to a person the qualities of the frozen snake in the fable (*Hoare* v. *Silverlock*, 12 Q. B. 632); or a writing which, after enumerating several acts of public charity done by a person, proceeds: "You will not play the Jew nor the hypocrite;" and then insinuates, that what the person did is owing to his vainglory. A declaration was held good where the libel complained of consisted of a paragraph in a newspaper, entitled, "An honest lawyer," followed by an imputation upon the plaintiff, of sharp practice. *Boydell* v. *Jones*, 4 M. & W. 446. Doggerel verses describing another as stinking of brimstone, and having the itch, are libelous. *Villers* v. *Monsley*, 2 Wils. 403. The defendant printed and published of the plaintiff, a witness in a cause then lately tried in the supreme court, the following: "Affidavits. Our army swore terribly in Flanders, said Uncle Toby, and if Uncle Toby were here now, he might say the same of some modern swearers. The man at the sign of the Bible,

the plaintiff, is no slouch at swearing to an old story." "These words," said the court, "import that the plaintiff swore with levity, rashly, and inconsiderately, without due regard to the solemnity of an oath, or to the truth or accuracy of what he said. If the words do not impute perjury in the legal sense, they hold the plaintiff up to contempt and ridicule, as thoughtless, or so immoral, as to be regardless of the obligations becoming a witness, and therefore utterly unworthy of credit. In this view the words are actionable." *Steele* v. *Southwick*, 9 Johns. 214. An obituary notice of a person living, if written and published falsely and maliciously, is a libel. *McBride* v. *Ellis*, 9 Rich. (S. C.) 313. To publish in writing an expression of belief that one has committed a felony is actionable *per se;* and the fact that the reasons for the belief are also given will not affect the question, unless those reasons explain away the charge. *Johnson* v. *St. Louis Dispatch Co.*, 2 Mo. App. R. 565.

The following, entered on the books of a corporation, is actionable, if intended by the defendant to impute dishonesty to the plaintiff, and if it was so understood by those who read it: "This company, for good and sufficient reasons, has resolved to dismiss D. D. Maynard from its service." *Maynard* v. *Fireman's Fund Ins. Co.*, 47 Cal. 207. A defamatory writing, which expresses only one or two letters of a name, in such a manner that what goes before and follows after it must be understood to signify a certain person, and would be nonsense if strained to any other meaning, is as much a libel as if it expressed the whole name. *Bourke* v. *Warren*, 2 Car. & P. 307; *Roach* v. *Read*, 2 Atk. 469.

A caricature, drawn or painted, is often more scandalous than any written representation; and the same may be said of burning a person in effigy, and other similar acts. An action was sustained for setting up a lamp adjoining the dwelling-house of the plaintiff, and keeping it burning in the day-time, with intent to convey the impression that the plaintiff was the keeper of a brothel. *Jefferies* v. *Duncombe*, 11 East, 226. A libel may be contained in hieroglyphics, or in a rebus, or anagram; or in language which is obscure, from being grossly illiterate; or in slang terms, whether referring to specific charges or not; or by an insinuation in the form of an interrogatory; or by comparing another with odious characters in a work of fiction. *Digby* v. *Thompson*, 4 B. & Ad. 821; 1 Nev. & Man. 485; *Reg.* v. *Gathercole*, 2 Lew. C. C. 225; *Woodgate* v. *Rideout*, 4 F. & F. 202; *Sawyer* v. *Eifert*, 2 N. & McCord, 511.

Responsibility may result for libelous matter contained in a paper filed in court. Thus, where the defendant, without probable cause,

maliciously made an affidavit containing libelous matter and filed it in a suit to which he was not a party, whereby the plaintiff was damaged in his business and in his reputation as a good citizen and an honorable man, the defendant was held liable for the damage. *Kelly* v. *Lafitte*, 28 La. Ann. 435. But a party cannot be held liable in damages for allegations set up by him in his pleadings in a suit, which assail the character of the other party, when it appears that the circumstances were such that he might reasonably have believed that the allegations were true. *Wallace* v. *New Orleans, etc., R. R. Co.*, 29 La. Ann. 66.

§ 3. **What publications are not libelous.** It is not libelous, merely to write of a person that he has done something in bad taste, or that he has kept company unworthy of his position in society, or of his position in his profession. *Clay* v. *Roberts*, 9 Jur. (N. S.) 580. The following notice was posted up in a public room: "The Rev. J. Robinson, the plaintiff, and Mr. J. K., inhabitants of this town, not being persons to whom the proprietors, or annual subscribers, think it proper to associate with, are excluded from this room." Held not actionable, for the reason that it did not represent the plaintiff as an improper person for general society, but merely stated the opinion of the defendants, that the parties excluded were not suitable persons to be associated with the defendants, and did not necessarily impute any thing derogatory to the moral character of the parties *Harman* v. *Delany*, 2 Str. 898. It is not libelous to publish in a newspaper that a certain physician meets homœopathists in consultation, though the declaration alleges that the profession regard the meeting of homœopathists in consultation as a breach of professional etiquette, and injurious to the professional character, reputation, and practice of a physician. *Clay* v. *Roberts*, 9 Jur. (N. S.) 580; 11 W. R. 649; 8 L. T. (N. S.) 397, Exch.

Publishing of a tradesman, that his goods are bad, is not actionable, if made *bona fide*, and is true; nor a statement in a newspaper, that a certain invention is different from what the inventor represents it to be, unless falsely and maliciously made. But imputing to a tradesman, that he is in the habit of selling goods which he knows to be bad, would be libelous. *Evans* v. *Harlow*, 5 Q. B. 624.

Mere puffs between rival tradesmen, the one depreciating the other's goods, and exalting his own above them, are not libelous. *Evans* v. *Harlow*, 5 Q. B. 624. An action cannot, therefore, be maintained for an imputation that the goods of a certain dealer are inferior to those of another, although the imputation be false, and special damage be alleged. *Young* v. *Macrae*, 3 B. & S. 264; *contra*, *Western Counties Manure Co.* v. *Lawes Chemical Manure Co.*, L. R., 9 Exch. 222; 10 Eng. Rep. 395. The same is true of a publication consisting of the

certificate of a professor of chemistry, embodying the result of a comparison between oils sold by the plaintiff and defendant, showing that the plaintiff's oil was inferior to the defendant's (*Young* v. *Macrae*, 3 B. & S. 264); and also, of a publication cautioning the public to deal with the agent of the defendants, if they wished to procure genuine Franklin coal, and stating that they had neither sold nor shipped Franklin coal to any party except their agent. *Boynton* v. *Remington*, 3 Allen, 397.

A publication relative to a person's conduct in prosecuting an illegal business which involves moral turpitude, or may fairly be held to affect his general character, is not actionable. *Manning* v. *Clement*, 7 Bing. 362; *Chenery* v. *Goodrich*, 98 Mass. 224. But it is otherwise of a publication which charges fraud beyond an illegal transaction; as to publish of another that he cheated in gambling and playing at dice. *Greville* v. *Chapman*, 5 Q. B. 744.

Publishing of another, who had been found guilty of selling spirituous liquors in violation of law, that he was a convicted felon, was held not libelous, if understood by the public to mean only an offense against the excise law. *Perry* v. *Man*, 1 R. I. 263. Charging that the plaintiff has figured quite prominently in some of the squatter riots is not libelous *per se*, as imputing to the plaintiff the offense of having been wrongfully and wantonly engaged in committing breaches of the peace. *Clarke* v. *Fitch*, 41 Cal. 472. Publishing of a person that he forged sentiments and words for Silas Wright, which he never uttered, without stating what the sentiments and words were, is not libelous. *Cramer* v. *Noonan*, 4 Wis. 231. And the same is true of a report of the condition of schools, made by the school committee to the town, and published by the defendants in their official capacity, pursuant to law, stating that the prudential committee employed a teacher, and placed her in charge of a school, contrary to law; took possession of the school-house, and forcibly excluded the school committee, and the teachers employed by them, without imputing corrupt motives. *Shattuck* v. *Allen*, 4 Gray, 540.

As injury to the plaintiff's character in public estimation is the basis of the action, an action cannot be maintained for the libelous contents of a letter delivered to the party himself, and not exhibited or its contents made known to any other person. *McIntosh* v. *Matherly*, 9 B. Monr. 119. (For *privileged communications*, see *post*, 304, 309, art. 3, §§ 2 and 3.)

§ 4. **Of the malicious intent.** Malice in an action for a libel consists in intentionally publishing, without justifiable cause, that which is injurious to the character of another. *Hagan* v. *Hendry*, 18 Md.

177. The term "malice" does not necessarily import ill-will toward the party injured, but only that the defendant in publishing the libel was actuated by improper and unjustifiable motives. *Com.* v. *Bonner*, 9 Metc. 410. And see *Gott* v. *Pulsifer*, 122 Mass. 235. When the natural effect of the language of the publication is to vilify another, the offender is deemed in point of law to have intended the consequences resulting from his act, and it is no less a libel if there was no such actual intent. *Curtis* v. *Mussey*, 6 Gray, 261; *Detroit Daily Post Co.* v. *McArthur*, 16 Mich. 447; *Sanderson* v. *Caldwell*, 45 N. Y. (6 Hand) 398; S. C., 6 Am. Rep. 105; *Baker* v. *Young*, 44 Ill. 42; *Dillard* v. *Collins*, 25 Gratt. 343; *Burt* v. *McBain*, 29 Mich. 266; *Lick* v. *Owen*, 47 Cal. 252; *Harwood* v. *Keech*, 6 N. Y. Sup. (T. & C.) 665; S. C., 4 Hun, 389. And see *Samuels* v. *Evening Mail Asso.*, 9 Hun (N. Y.), 288. Or if the defendant believed that the charge was true, where the circumstances show an indifference to its truth or falsity. *Haire* v. *Wilson*, 9 B. & C. 643; *Fisher* v. *Clement*, 10 id. 472; *Smart* v. *Blanchard*, 42 N. H. 137; *Whittemore* v. *Weiss*, 33 Mich. 348; *Wilson* v. *Noonan*, 35 Wis. 321. Where, on the trial of an action for libel, the instruction, which the court was asked to give, assumed that there might be an entire want of malice without making any distinction between the malice which the law implies from the wrongful and unlawful publication, and that which has its foundation in a depraved, wicked, or malignant intention to injure and defame, it was held that the instruction was properly refused. *Wilson* v. *Noonan*, 27 Wis. 598.

Although the gist of the action for libel is the malice, or intention of the defendant to injure the character of the plaintiff, and malice is implied whenever the language employed is libelous (*Washburn* v. *Cooke*, 3 Denio, 110; *Lucas* v. *Case*, 9 Bush [Ky.], 297; *Byrket* v. *Monohon*, 7 Blackf. [Ind.] 83), yet, as the degree of malice, or extent of the defendant's disposition to injure the plaintiff's character, does not always fully appear from the libel itself, resort may be had to the conduct and conversation of the defendant. Where the circumstances show that the defendant may reasonably be supposed to have had a just and worthy motive in making the charge, the law ceases to infer malice from the falsity of the charge, and requires of the plaintiff other proof of its existence. *Lewis* v. *Chapman*, 16 N. Y. (2 Smith) 372; *Simmons* v. *Holster*, 13 Minn. 249; *Liddle* v. *Hodges*, 2 Bosw. (N. Y.) 537. When the burden of proving express malice is thus thrown upon the plaintiff, he may give evidence of any personal hostility, or spite, entertained against him, by the defendant. *Fry* v. *Bennett*, 28 N. Y. (1 Tift.) 324; S. C., 3 Bosw. 200. An intent to

villify may be shown by threats, or other language, indicative of ill-will, or by conduct evincive of similar feelings. *Hart* v. *Reed*, 1 B. Monr. (Ky.) 166; *Morgan* v. *Livingston*, 2 Rich. (S. C.) 573. As if the publication were, at the time, known to be false; or was made without authority; or indifference was manifested, whether the charge was true or false, and whether the plaintiff was injured or not; or there was a neglect to repair the injury, by retracting the charge, when it was discovered to be false. *Moore* v. *Stevenson*, 27 Conn. 14; *Hotchkiss* v. *Porter*, 30 id. 414. The publication of defamatory matter in a way more injurious than was required would afford evidence of malice; as the transmission, unnecessarily, of libelous matter by telegraph, or by postal card, when it might have been sent by letter. *Williamson* v. *Freer*, L. R., 9 C. P. 393; 10 Eng. R. 225; 43 L. J. C. P. 161. Distinct libels against the plaintiff not declared on may be given in evidence, to show the *quo animo* (*Vanderveer* v. *Sutphin*, 5 Ohio St. 293; *Curtis* v. *Mussey*, 6 Gray, 261; *White* v. *Sayward*, 33 Me. 322); but not subsequent publications, which do not relate to the libel in suit. *Mix* v. *Woodward*, 12 Conn. 262. See *Pearson* v. *Lemaitre*, 6 Scott N. R. 607; *Schoonover* v. *Rowe*, 7 Blackf. (Ind.) 202; *Flamingham* v. *Boucher*, Wright (Ohio), 746; *Root* v. *Lowndes*, 6 Hill, 518. Handbills circulated by the defendant, or a letter written by him to the plaintiff, on the same subject as the libel, would be good evidence to show the *quo animo* with which the libel was published. *Bond* v. *Douglas*, 7 Car. & P. 626; *Tarpley* v. *Blabey*, 2 Bing. N. C. 437; 2 Scott, 642. See, also, *Cheritree* v. *Roggen*, 67 Barb. 124. But the refusal of the sub-editor of a newspaper to publish a retraction of a libelous article published in such newspaper is not admissible in evidence, to show malice on the part of the proprietors of the paper. *Edsall* v. *Brooks*, 2 Robt. (N. Y.) 414; S. C., 33 How. 191. And to maintain an action for an alleged libel injurious to the plaintiff's business, it is not enough to show that the defendant's publication was false, but there must be proof of malice or a willful purpose to inflict injury. If the defendant published the article in good faith, as a warning to dealers against an invasion of his rights, a mistake on his part, as to the validity of his right, would not render him liable to an action. *Hovey* v. *The Rubber Tip Pencil Co.*, 57 N. Y. (12 Sick.) 119; 15 Am. Rep. 470; *Wren* v. *Weild*, L. R., 4 Q. B. 730.

All persons who give currency to a libelous publication are equally guilty with the one who originated it. *Cade* v. *Redditt*, 15 La. Ann. 492. It is, therefore, no justification that the libelous matter was previously published by a third person, and that the defendant at the time of the publication disclosed the name of that person, and believed all

the statements contained in the libel. *Sans* v. *Joerris*, 14 Wis. 663; *Clarkson* v. *McCarty*, 5 Blackf. (Ind.) 574. So, publishing in a newspaper a libelous article which is taken from another paper, giving the authority, contradicting some of the statements, and saying nothing about the libelous charges, constitutes libel. *Hotchkiss* v. *Oliphant*, 2 Hill, 510. And a person cannot protect himself from responsibility for a libel on the ground that the libelous matter was the subject of general rumor (*Johnston* v. *Lance*, 7 Ired. [N. C.] 448); nor by pleading his ignorance of the real parties who are attacked, if he knows the publication to be libelous. *Dexter* v. *Spear*, 4 Mason (C. C.), 115.

Although an article in a newspaper may have been intended by the writer to be libelous and to apply to the plaintiff, yet, if the publisher of the paper did not know that the article applied to him, but supposed that it was a mere fancy sketch or fictitious story, the publisher is not liable. *Smith* v. *Ashley*, 11 Metc. 367. But where a book or pamphlet containing libelous matter is sold from a bookseller's shop, in the usual course of trade, it is no excuse that the bookseller was ignorant of the contents of the book, or that it was sold by a servant when the master was absent, and had no knowledge that such a book had ever been in his shop, or was sold on his account. *Nutt's Case*, Fitzg. 47. And the publisher and proprietor of a newspaper is responsible for a libel published therein, though inserted by his employees in his absence and without his knowledge or consent (*Dunn* v. *Hall*, Smith [Ind.], 228; S. C., 1 Ind. 344; *Huff* v. *Bennett*, 4 Sandf. [N. Y.] 120); or contrary to his instructions. *Perret* v. *Times Newspaper*, 25 La. Ann. 170.

§ 5. **Construction of the language.** The court may, in its discretion, instruct the jury that the publication is, in point of law, a libel (*Tuson* v. *Evans*, 12 Ad. & E. 733; *Levi* v. *Milne*, 4 Bing. 195); but it is not bound to do so. The more proper course is for the judge to define what is a libel, and to leave it to the jury to say whether the publication falls within that definition. *Baylis* v. *Lawrence*, 11 Ad. & E. 105; *Hearne* v. *Stowell*, 12 id. 719; *Shattuck* v. *Allen*, 4 Gray, 540; *Hunt* v. *Bennett*, 19 N. Y. (5 Smith) 173. The judge may charge the jury that they are to consider the entire writing, and say what is its meaning, and what it imputes to the plaintiff, as to motives, objects, principles, acts, and character; and if found to be such, according to the definition given, as to render the writing libelous, false, and malicious, the verdict must be for the plaintiff. *Graves* v. *Waller*, 19 Conn. 90. When the declaration sets forth only a part of the publication and the whole is read without objection, the jury may consider the whole, in order to determine the meaning of the part declared on.

Goodrich v. *Stone*, 11 Metc. 486. Where a writing alleged to be libelous contains malicious statements concerning other persons beside the plaintiff, the jury may infer therefrom that what is said of the plaintiff is also malicious. *Miller* v. *Butler*, 6 Cush. 71.

Where a libel, untrue in fact, is published under the belief that it is true, the question whether the occasion justified the act is one of law. *Darby* v. *Ouseley*, 36 Eng. L. & Eq. 518; 1 H. & N. 1. If there be no evidence of such facts and circumstances as would, if found by the jury, raise either an absolute or qualified justification or excuse, the question of malice is a legal inference. *Bromage* v. *Prosser*, 4 B. & C. 247; *Jarnigan* v. *Fleming*, 43 Miss. 710; *Dillard* v. *Collins*, 25 Gratt. (Va.) 343; *Gott* v. *Pulsifer*, 122 Mass. 235.

When the language of an alleged libel is ambiguous and capable of being understood in an innocent, and harmless, as well as in an injurious sense, its interpretation is a question for the jury. But if, upon an examination of the whole writing, and a comparison of its different parts, it appears to admit of no just construction, except one which is injurious to the plaintiff, its meaning is to be determined by the court. *Haire* v. *Wilson*, 9 B. & C. 643; *Fisher* v. *Clement*, 10 id. 472; *Hoare* v. *Silverlock*, 12 Q. B. 632; *Van Vechten* v. *Hopkins*, 5 Johns. 211; *Snyder* v. *Andrews*, 6 Barb. 43; *Lewis* v. *Chapman*, 16 N. Y. (2 Smith) 639; *Pittock* v. *O'Niell*, 63 Penn. St. 253; 3 Am. Rep. 544. If the meaning of the publication is so obscure, that it is incapable of being understood, the action cannot be maintained, although the plaintiff's name is mentioned, and the writing was evidently meant to annoy him. *Capel* v. *Jones*, 4 C. B. 263. But the case ought always to be submitted to the jury, unless the court can see upon the face of the record that the matter is not libelous. *Fray* v. *Fray*, 17 C. B. (N. S.) 603.

The question as to the person referred to in a libelous publication is one of fact to be determined by the jury. *State* v. *Jeandell*, 5 Harring. (Del.) 475. Likewise as to the question whether the language of the publication was intended in a sense injurious to the plaintiff. *Simmons* v. *Morse*, 6 Jones (N. C.), 6; *Edsall* v. *Brooks*, 3 Rob. (N. Y.) 284; *Edwards* v. *Chandler*, 14 Mich. 471; *Pugh* v. *McCarty*, 40 Ga. 444. And so, also, is the question as to the fairness of a report of proceedings before a magistrate, or a court of justice. *Street* v. *The Licensed Victuallers' Soc.*, 22 W. R. 553; *Risk Allah Bey* v. *Whitehurst*, 18 L. T. (N. S.) 615; *Green* v. *Telfair*, 20 Barb. 11; *Huff* v. *Bennett*, 4 Sandf. (N. Y.) 120.

In construing an alleged libelous publication, it is the duty of the court and jury to consider the scope and object of the whole article,

and to understand it in the same manner that others would naturally do, without a strained endeavor to palliate the offense. *Cooper* v. *Greeley*, 1 Denio, 358; *More* v. *Bennett*, 48 N. Y. (3 Sick.) 472; *Stewart* v. *Wilson*, 23 Minn. 449. Where the alleged libel was as follows: "Threatening letters. The Middlesex grand jury have returned a true bill against a gentleman of some property, named French;" it was held that the words could not be read in any other sense, than that the grand jury had found a true bill against the plaintiff, whose name was French, for sending threatening letters, and that such a bill imported an unlawful threatening letter. *Harvey* v. *French*, 1 Cr. & M. 17. When it is doubtful whether the language imputes any thing injurious to the plaintiff, the question for the jury is not whether the intention was to injure the plaintiff, but whether the tendency of the publication is injurious to him. *Fisher* v. *Clement*, 10 B. & C. 472. Where, from the fact that a blank was left for the name, or only initials were given, or that a fictitious name was introduced, it is doubtful whether or not the plaintiff was intended, witnesses are competent, who from their knowledge of the parties, and the circumstances, are able to form a conclusion as to the defendant's intention, and the application of the libel. And the declarations of spectators, when they look at a libelous picture publicly exhibited, is evidence to show that it was meant to represent the party alleged to have been libeled. *De Bost* v. *Beresford*, 2 Camp. 512; *Meriwether* v. *Turner*, 19 L. J. C. P. 10; *Smart* v. *Blanchard*, 42 N. H. 137; *DeArmond* v. *Armstrong*, 37 Ind. 35. But in action for a libel contained in a newspaper, it is not proper to show by a witness that on reading the article he considered that the plaintiff was the person intended. *White* v. *Sayward*, 33 Me. 322; *Goodrich* v. *Stone*, 11 Metc. 486.

Where "perjury" has been charged in an alleged libel, it is for the jury to determine, by a scrutiny of the whole publication, whether the word was used by the defendant in a popular sense, or as charging the technical crime of perjury. *Hawkins* v. *New Orleans Printing, etc., Co.*, 29 La. Ann. 134.

§ 6. **What is a publication.** A publication of the libel, which is necessary to complete the offense and render it actionable, may be effected in a variety of ways, as by distributing, speaking, singing, sending it by telegraph, or showing it; and the fact of publication may be gathered from the whole declaration, without special averment. *Rex* v. *Burdett*, 4 B. & Ald. 126; *Baldwin* v. *Elphinston*, 2 W. Bl. 1037; *Williamson* v. *Freer*, L. R., 9 C. P. 393; 10 Eng. Rep. 225; *Entick* v. *Carrington*, 11 St. Tr. 321; *Rex* v. *Almon*, 5 Burr.

2689; *Resp* v. *Davis*, 3 Yeates (Penn.), 128 One who knowingly circulates a libel, publishes it. But to constitute a publication it is not necessary that the contents of the writing should be communicated to the public generally. It is sufficient, if they are made known to a single third person. Reading a libelous letter aloud to another constitutes a publication. *Snyder* v. *Andrews*, 6 Barb. 43. Where the writer of a letter containing a libel, after sending it sealed, remarked in the presence of several persons that he got another to write the letter for him, that he put his name to it and kept a copy, and then stated the contents of the letter without exhibiting it or the copy, it was held a publication of the libel. *Adams* v. *Lawson*, 17 Gratt. (Va.) 250. When a letter is given to a person to copy, the copy immediately sent to a foreign country, and the original kept in the defendant's possession, it is a publication here, although the person abroad, to whom the letter is addressed, does not understand the language in which the letter is written. *Kiene* v. *Ruff*, 1 Iowa, 482.

If a person wraps up a libelous publication and sends it into another county by a boy, the person sending the paper publishes it and not the boy, who is ignorant of the contents of the paper. *Rex* v. *Burdett*, 4 B. & Ald. 125. So, the innocent delivery of a sealed letter by a postmaster, or by another at his request, would not be a publication of a libel, which was in the letter without his knowledge. But it would be a publication if he knew any thing of the libel before delivery, or circulated others of the same kind after knowledge of it; and his acts and declarations, at the time of the delivery of the letter, would be evidence of knowledge. *Layton* v. *Harris*, 3 Harring. (Del.) 406.

It has been seen, *ante*, 287, § 3, that when a letter, containing a libel, is written to and received by the plaintiff alone, it is not such a publication as will support an action. *Phillips* v. *Jansen*, 2 Esp. 624; *Lyle* v. *Clason*, 1 Caines (N. Y.), 581; *McIntosh* v. *Matherly*, 9 B. Monr. (Ky.) 119. Where, therefore, a libelous letter, folded but not sealed, was delivered to another to be carried to the plaintiff, and was so conveyed by him, but without reading it, it was held that an action would not lie. *Clutterbuck* v. *Chaffers*, 1 Stark. 471. And throwing a sealed letter addressed to the plaintiff into the inclosure of another, who delivers it to the plaintiff, is not a publication, although the plaintiff afterward repeats the contents of the letter publicly, and the defendant acknowledges that he is the author of it. *Fonville* v. *McNease*, Dudley (S. C.), 303. But where the defendant wrote a letter containing a libel to the plaintiff, knowing that the clerk of the plaintiff in his absence

was in the habit of opening the plaintiff's letters, and the letter was received and opened by the clerk before it was seen by the plaintiff, it was held that there was sufficient evidence for the jury to consider whether the defendant did not intend to put the clerk in possession of the letter, and if he did, it amounted to a publication. *Delacroix* v. *Thevenot*, 2 Stark. 63. And where a letter containing a libel against the plaintiff, and addressed to the plaintiff's clerk, was opened by the plaintiff and shown to his clerk, it was held to be a publication by the defendant. *Ahern* v. *Maguire*, Arms, M. & O. (Ir.) 3. There may be a publication, although the person to whom the libel is shown is enjoined to keep it secret. *McGowan* v. *Manifee*, 7 Monr. (Ky.) 314. But where a person has a libelous caricature in his house, it is not a publication for him to show it to another upon being asked to do so. *Smith* v. *Wood*, 3 Camp. 323.

A sealed letter addressed and delivered to the wife, containing a libel on her husband, is a publication. *Schenck* v. *Schenck*, 1 Spencer (N. J.), 208; *Wenman* v. *Ash*, 13 C. B. 837; 22 L. J. C. P. 190. But it was doubted whether the sending of a libelous letter to the husband, reflecting on the wife, would be a sufficient publication to sustain an action. Id. *Per* Jervis, C. J. When a letter is sent by mail, it is *prima facie* evidence that the person to whom it was addressed received it in due course. *Warren* v. *Warren*, 1 Cr. M. & R. 250. Where two persons compose a libelous letter, which is written by one of them, and sent through the post-office to a third party, it is a publication by both. *Miller* v. *Butler*, 6 Cush. 71. The responsibility of the writer of a libelous letter, who sends it by mail to another person, is not confined to the consequences of communicating the libel to the party to whom the letter is addressed, but extends to the tendency and consequences of putting the libel in circulation. Id. If a libelous letter be sent by mail, it is a publication, by the person sending it, in any county into which the letter is in consequence carried. Where, therefore, the writer of a libel mailed it, addressed to A, in the county of B, and it was in consequence sent into that county, and thence into the county of C, where A received and read it, it was held to be a publication in the county of C. *Rex* v. *Watson*, 1 Camp. 215.

When a libel is published in a newspaper, that fact alone is sufficient to charge the proprietor of the newspaper with its publication; and it is not a defense that he never saw the libel; did not know of its publication until it was sent to him, and that a retraction was afterward published in the same paper. *Com.* v. *Morgan*, 107 Mass. 199; *Perret* v. *Times Newspaper*, 25 La. Ann. 170. Every sale of a newspaper containing a libel is a fresh publication. Where, therefore, an

action was brought for a libelous article in a newspaper published seventeen years previous, to which the statute of limitations was pleaded, it was held a sufficient answer to the plea that a copy of the paper had been purchased from the defendant by the plaintiff within the six years. And where there was a sale of a copy of a newspaper to a messenger sent by the plaintiff to obtain it, it was held a sufficient publication to sustain an action. A copy of the newspaper in which the libel appeared, with proof that the defendant acknowledged that he handed it to the editor for insertion, is evidence of publication. *Woodburn* v. *Miller*, Cheves (S. C.), 194.

The willful or intentional delivery of a libel by a bookseller or peddler is a publication of it, although the party delivering it had no knowledge of its contents. Bac. Abr., tit. Libel. But a porter who, in the course of his employment, delivers a parcel containing libelous matter, is not liable, if he knew nothing of the contents of the parcel. *Day* v. *Bream*, 2 Mood. & Rob. 54.

The publication may be accidental, as where a libel is by mistake addressed and mailed to the plaintiff's employer instead of to the plaintiff himself. *Fox* v. *Broderick*, 14 Irish C. L. R. 453. But it has been doubted whether an action would lie, if a gentleman applied to by another, by letter, relative to the character of a servant, should reply, in good faith, stating acts of dishonesty and immorality committed by the servant, and by mistake should direct his reply to a person different from the inquirer, though of the same name. *Harrison* v. *Bush*, 5 E. & B. 350.

The publication may be through the instrumentality of an agent (*Edwards* v. *Wooten*, 12 Rep. 35; *Nutt's Case*, Fitzg. 47; *Rex* v. *Almon*, 5 Burr. 2689; *Rex* v. *Walter*, 3 Esq. 21; *Plunkett* v. *Cobbett*, 5 id. 136); although the agent changes the language of the libel and only gives the sense and substance of it. *Parkes* v. *Prescott*, L. R., 4 Exch. 169; 38 L. J. Exch. 105. When a person writes an article for publication and gives it to the publisher of a German paper to be translated by him into German, and so published, the writer of the article makes such publisher his agent in that behalf, and is responsible for its publication, although the translation is inaccurate. *Wilson* v. *Noonan*, 27 Wis. 598. But where the defendant's daughter, who was employed by him to make out his bills and write letters for him on matters of business, wrote and published a libel against the plaintiff in her father's name, it was held that he was not liable therefor, a principal only being responsible for the acts of his agent within the limits of the authority delegated to the agent. *Harding* v. *Greening*, 1 Moore, 479; 1 Holt's N. P. 531.

In case of doubt whether there has been any publication, it is a question for the jury; but, where the facts are undisputed, the question of publication is one of law, for the court. *Baldwin* v. *Elphinston*, 2 W. Bl. 1037; *Delacroix* v. *Thevenot*, 2 Stark. 63; *Clutterbuck* v. *Chaffers*, 1 id. 471. It is evidence of publication that the newspaper came from the defendant's office, and is a copy of an edition of the same date. *State* v. *Jeandell*, 5 Harring. (Del.) 475. Where a printed song which was libelous was sung in the streets, and afterward destroyed, the person who sung the song was allowed to testify that a paper produced was a copy of the song that was sung. *Johnson* v. *Hudson*, 7 Ad. & E. 233, *n*. Where a libel is circulated, the fact that it is in the defendant's handwriting is *prima facie* evidence that he published it. *Mullett* v. *Hulton*, 4 Esp. 248; *Giles* v. *State*, 6 Ga. 276; *McCoombs* v. *Tuttle*, 5 Blackf. (Ind.) 431. If the libel has marked peculiarities in spelling, or composition, writings of the defendant relative to the plaintiff, exhibiting similar peculiarities, are admissible in evidence, to show that the defendant was the author of the libel. *Brookes* v. *Tichborne*, 5 Exch. 929. But proof that a person communicated partly in writing and partly in conversation, the materials from which another composed a libel is not evidence of publication. *Cochran* v. *Butterfield*, 18 N. H. 115. The malicious intent in making the publication may appear from the writing itself and from the circumstances. *Schenck* v. *Schenck*, 1 Spencer (N. J.), 208. Where the writing is exhibited without the consent of the author, it is not a publication as to him. *Barrow* v. *Lewellin*, Hob. 62; *Weir* v. *Hoss*, 6 Ala. 881. A confession by the defendant that he wrote the libel is not an admission of the publication of it by him. *Case of the Seven Bishops*, 4 St. Tr. 304.

ARTICLE II.

ACTIONS FOR LIBELS.

Section 1. In general. A person whose character has been assailed by a defamatory publication is entitled to an action at law therefor against the libeler, in which he may recover damages for the injury. The treatment of libels in general, in the preceding article, necessarily led to the consideration of the grounds upon which an action can be sustained, and it, therefore, only remains in this place to speak of the presentation by the plaintiff of his case.

The very language of the writing alleged to be libelous must be set out in the declaration, in order that the court may see that it is

capable of the interpretation which the plaintiff seeks to put upon it, and of producing the injury which is claimed to have resulted; and that the defendant may be apprised of the charge, and be able to shape his defense. *Cook* v. *Cox*, 3 M. & S. 116; *Wood* v. *Brown*, 6 Taunt. 169; *Wright* v. *Clements*, 3 B. & Ald. 503; *Parsons* v. *Bellows*, 6 N. H. 289; *Yundt* v. *Yundt*, 12 Serg. & R. 427; *Winter* v. *Donovan*, 8 Gill (Md.), 370; *Forsyth* v. *Edmiston*, 6 Duer (N. Y.), 653; *Lee* v. *Kane*, 6 Gray, 495; *Taylor* v. *Moran*, 4 Metc. (Ky.) 127; *Zeig* v. *Ort*, 3 Chand. (Wis.) 26; *Bagley* v. *Johnston*, 4 Rich. (S. C.) 22. The entire publication need not, however, in general be set out, but only the libelous passages, even though the latter refer to other parts of it, provided the part set out is in itself distinct and intelligible. *Buckingham* v. *Murray*, 2 C. & P. 46; *Whittaker* v. *Freeman*, 1 Dev. (N. C.) 271; *Whiting* v. *Smith*, 13 Pick. 364; *Spencer* v. *McMasters*, 16 Ill. 405. But if the rest of the writing contains a qualification of the meaning of the parts which are claimed to be libelous, or if a substantial difference of construction would arise upon the whole publication, it should be set out in full. *Rutherford* v. *Evans*, 6 Bing. 451. A libel written in a foreign language must be set out in the original with a translation showing its application to the plaintiff. *Zenobio* v. *Axtell*, 6 Term R. 162. If the libel set out vary from that which is proved, in any material respect, from omissions, or additions, affecting its meaning, the variance, unless the declaration is amended, will be fatal to the action. *Bell* v. *Byrne*, 13 East, 554; *Tabart* v. *Tipper*, 1 Camp. 350; *Cartwright* v. *Wright*, 5 B. & Ald. 615; *Winter* v. *Donovan*, 8 Gill (Md.), 370; *Street* v. *Bushnell*, 24 Mo. 328; *Birch* v. *Benton*, 26 id. 153; *McCoombs* v. *Tuttle*, 5 Blackf. (Ind.) 431.

If the libel be not direct, but only by allusion, its meaning must be pointed out by explanatory innuendoes. *State* v. *Neese*, 2 Taylor (N. C.), 270. When, however, the libelous character of the writing set out is apparent on its face, innuendoes are unnecessary. *Gage* v. *Shelton*, 3 Rich. (S. C.) 242. Where the plaintiff is not mentioned by name in the publication, such facts and circumstances should be alleged by way of inducement, as make it plain that he was the person intended. *Miller* v. *Maxwell*, 16 Wend. 9. And when the libel does not on its face appear to relate to the plaintiff, it must be shown in what way it relates to him, notwithstanding the previous averment that it was published of and concerning him. *Clement* v. *Fisher*, 7 B. & C. 459; *Stockley* v. *Clement*, 4 Bing. 162. If the libel cannot, by any fair and reasonable intendment, from the language itself, be construed as reflecting upon the plaintiff, the court will not, in the absence of a

colloquium pointing to its meaning, or an averment of special damage, put a libelous construction upon it. *Capel* v. *Jones*, 4 C. B. 259.

Although malice in law, or fact, is essential to the action, yet the word "maliciously" need not be used; but any form of language will suffice, from which the malicious intent can be inferred. *White* v. *Nicholls*, 3 How. (U. S.) 266. The allegation that the defendant published a malicious, injurious, and unlawful advertisement, is good without the word "false." *Rowe* v. *Roach*, 1 M. & S. 304.

The libel itself must be produced and shown, or read to the jury, unless it has been lost or destroyed; in which case secondary evidence may be given of its contents. *Wright* v. *Woodgate*, 2 Cromp., M. & R. 573. But before any evidence can be given of the contents of a libel, *prima facie* evidence must be given of a publication by the defendant. In general, where the declaration avers the existence of particular facts, and that the publication was of and concerning those facts, their existence, if material, must be proved. *Teesdale* v. *Clement*, 1 Chit. 603.

Where the name of the plaintiff is not mentioned in the libel, witnesses may be introduced to testify that they were acquainted with the parties, and familiar with the relations existing between them immediately prior to and at the time the publication was made, and that, on reading it, they understood it to apply to the plaintiff. *Russell* v. *Kelley*, 44 Cal. 641; 13 Am. Rep. 169; *Briggs* v. *Byrd*, 11 Ired. 353; *Howe Machine Co.* v. *Souder*, 58 Ga. 64; *White* v. *Sayward*, 33 Me. 322; *Snell* v. *Snow*, 13 Metc. 278; *contra*, *Van Vechten* v. *Hopkins*, 5 Johns. 211; *Rangler* v. *Hummel*, 37 Penn. St. 130. And a subsequent publication made by the defendant, in which the plaintiff is referred to by name, is admissible in evidence, for the purpose of showing that the plaintiff is the one referred to in the libel. *Russell* v. *Kelly*, 44 Cal. 641; 13 Am. Rep. 169.

Unless the occasion is such as repels the presumption of malice, malice in fact need not be proved except for the purpose of enhancing the damages. Although the communication is privileged, slight evidence of malice will be sufficient to sustain the action. *Fowles* v. *Bowen*, 30 N. Y. (3 Tiff.) 20; *Pool* v. *Devers*, 30 Ala. 672; *Richardson* v. *Roberts*, 23 Ga. 215. Other similar publications made by the defendant on the same or the following day, are admissible in evidence to show malice. *Whittemore* v. *Weiss*, 33 Mich. 348.

§ 2. **Who may sue.** The proper party plaintiff is the person immediately injured, and not one who may be indirectly or remotely affected by the libel. *Harvey* v. *Coffin*, 5 Blackf. (Ind.) 566; *Loughead* v. *Bartholomew*, Wright (Ohio), 90. Where a bill in equity

charged two persons with the fraudulent alteration of written instruments, without specifying which of them did it, it was held that an action therefor might be brought by either of them. *Forbes* v. *Johnson*, 11 B. Monr. (Ky.) 48. When the libel, though apparently applicable only to a class of persons, is yet capable of being directly applied to an individual of that class, an action may be maintained by him. *Fanu* v. *Malcomson*, 1 Clark & Fin. (N. S.) 637. At common law, where the libel is against the wife, the action must be brought in the names of the husband and wife. If the defamation be against both of them, a separate action must be brought for the injury to him, and a joint action for the injury to the wife. *Ebersoll* v. *Krug*, 3 Binn. (Penn.) 555; *Hart* v. *Crow*, 7 Blackf. (Ind.) 351; *Bash* v. *Sommer*, 20 Penn. St. 159; *Gazynski* v. *Colburn*, 11 Cush. 16; *Penters* v. *England*, 1 McCord (S. C.), 14. An action for a libel against partners in their trade may be brought by them jointly, and they may sue in the firm name. *Maitland* v. *Goldney*, 2 East, 426; *Forster* v. *Lawson*, 11 Moore, 360; *Giraud* v. *Beach*, 3 E. D. Smith (N. Y.), 337. Where a libel concerning partners in their partnership business is actionable *per se*, either partner may sue separately to recover damages for the injury sustained by him, notwithstanding the firm is also injured. *Taylor* v. *Church*, 3 E. D. Smith (N. Y.), 279; *Tait* v. *Culbertson*, 57 Barb. 9; S. C. affirmed, 6 Alb. L. J. 177. An action brought jointly by the members of a fire company, for a publication accusing members of the company of theft, without naming individuals, cannot be sustained; the members of the company, not being partners, nor so situated that the accusation could affect them injuriously as a company. *Giraud* v. *Beach*, 3 E. D. Smith (N. Y.), 337. A corporation may sue at common law, for words falsely and maliciously written and published of it, in the way of its trade or business, or of its property, or concerns, or of its officers, servants, or members, by reason of which special damage is sustained by the corporation. *Metrop. Saloon Omnibus Co.* v. *Hawkins*, 4 H. & N. 90; *Trenton Ins. Co.* v. *Perrine*, 3 Zabr. (N. J.) 402. Upon the death of a party the action does not survive. *Nettleton* v. *Dinehart*, 5 Cush. 543.

§ 3. **Who may be sued.** An action may be brought against the disseminator of a libelous publication as well as against the person who originated it. Where two persons unite in the libel they may both be made defendants (*Maitland* v. *Goldney*, 2 East, 426; *Webb* v. *Cecil*, 9 B. Monr. [Ky.] 198); and an action may be brought against the husband and wife for a libel published by them jointly. *Catterall* v. *Kenyon*, 3 Q. B. 310; *Keyworth* v. *Hill*, 3 B. & Ald. 685. The writer of a libel may be sued, notwithstanding an action has been

brought against the publisher for the same libel. *Frescoe* v. *May*, 2 F. & F. 123. But where the proprietor of a paper has been convicted and fined for a libel inserted in the paper without his knowledge and consent, he cannot recover against the editor the amount of the fine. *Colburn* v. *Patmore*, 1 C. M. & R. 73. A corporation aggregate may compose and publish a libel, and, by reason thereof, become liable to an action for damages by the person of, and concerning whom, the words were composed. *Whitfield* v. *Southeastern R. R. Co.*, Ell. Bla. & E. 115; *Alexander* v. *Northeastern R. R. Co.*, L. J. Q. B. 152; *Phila., etc., R. R. Co.* v. *Quiyley*, 21 How. (U.S.) 202; *Aldrich* v. *Press Printing Co.*, 9 Minn. 133; *Maynard* v. *Fireman's Fund Ins. Co.*, 34 Cal. 48; S. C., 47 id. 207; *Vinas* v. *Merchants' Mut. Ins. Co.*, 27 La. Ann. 367; *Howe Machine Co.* v. *Souder*, 58 Ga. 64. Thus it is well settled that a printing and publishing corporation may be held liable in a civil action for libel. *Johnson* v. *St. Louis Dispatch Co.*, 2 Mo. App. R. 565.

§ 4. **Damages.** It is the duty of the court to properly instruct the jury as to the rule of law in relation to damages. *Duncan* v. *Brown*, 15 B. Monr. (Ky.) 186. The spirit and intention of a person in publishing a libel are proper to be considered by the jury in estimating the injury done to the plaintiff. Such evidence cannot be excluded on the ground that it may disclose another and different cause of action; and either party may introduce evidence to prove or disprove the existence of a malicious motive in the publisher of defamatory matter. *Pearson* v. *LeMaitre*, 6 Scott N. R. 607; *Jellison* v. *Goodwin*, 43 Me. 287. Where express malice is proved, the jury may give exemplary damages. *Kinney* v. *Hosea*, 3 Harring. (Del.) 397; *Taylor* v. *Church*, 8 N. Y. (4 Seld.) 452; *Symonds* v. *Carter*, 32 N. H. 458; see *Samuels* v. *Evening Mail Ass.*, 9 Hun (N. Y.), 288. When a subsequent publication is proved to show the *animus* of the defendant, and the judge in his charge leaves it to the jury to find whether the proposed publication is libelous, and, if so, to assess the damages, he is not bound to direct their attention to the subsequent publication, and instruct them not to give damages for it. *Darby* v. *Ousley*, 1 H. & N. 1; 25 L. J. Exch. 227. The jury may take into consideration the fact that the libel was persisted in down to the time of the verdict. Where the defendant's counsel cross-examined the plaintiff, in order to show that he was guilty of a crime for which he had been acquitted, it was held an aggravation of the libel, and that a larger amount of damages might be given therefor. *Risk Allah Bey* v. *Whitehurst*, 18 L. J. (N. S.) 615. A plea of justification may be considered by the jury in aggravation of damages. *Wilson* v. *Robinson*, 7 Q. B. 68.

Special damages, to be recoverable, must be the natural and direct or reasonable consequence of the libel (*Terwilliger* v. *Wands*, 17 N. Y. [3 Smith] 57); and it must be alleged and proved. *Bassil* v. *Elmore*, 65 Barb. 627. The defendant, having published a libel concerning a female performer at a place of public amusement, she refused to sing, and the proprietor brought an action, alleging as special damage that his oratorios had, in consequence of her absence, been more thinly attended; and it was held that the injury was too remote; that, if the performer was really injured, an action lay at her suit, and it did not appear but that her refusal arose from caprice or indolence. *Ashley* v. *Harrison*, 1 Esp. 48. *Ante*, Vol. 1, 39, 149.

In proving special damage, it must be shown in what manner the plaintiff's character could suffer from the alleged libelous imputation. *Hearne* v. *Stowell*, 12 Ad. & E. 719. Where a female, in an action for a newspaper article charging her with stealing, alleged as special damage that, by reason of the libel, she was discharged by her employer from his service in a neighboring town, it was held proper for her to show that, a few days after the publication, her employer said to her that there were flying reports in the newspaper about her and her sister, and that it would injure his shop to have such girls there, and that he thereupon discharged her, although it was not proved that her employer saw the libelous article, nor what report and newspaper he referred to. *Moore* v. *Stevenson*, 27 Conn. 14. The plaintiff, being possessed of shares in a silver mine, touching which shares certain claimants had filed a bill in chancery, to which the plaintiff had demurred, the defendant falsely published that the demurrer had been overruled, a receiver appointed, and that persons duly authorized had arrived at the mine, and it was held that an allegation that the plaintiff was injured in his rights, the shares lessened in value, divers persons believed he had no right to the shares, the mine could not be worked, he was prevented from selling his shares and from working the mine in so ample a manner as he otherwise would have done, and from gaining divers profits which would otherwise have accrued to him, was not a sufficient averment of special damage. *Malachy* v. *Soper*, 3 Bing. N. C. 371. In an action for a libel in imputing unseaworthiness to a ship, the plaintiff may give evidence of special damage, although he has not averred it in his declaration. *Ingram* v. *Lawson*, 9 C. & P. 326. See 6 Bing. N. C. 212.

The rule of law in an action for libel is not that if the plaintiff relies only on general injury to his business he may show by witnesses the general diminution of that business, because the law assumes the existence of a general injury. If the plaintiff seeks special dam-

ages, he must give special evidence. *Delegall* v. *Highley*, 8 C. & P. 444. In estimating the damages in such cases, the jury must have before them some evidence as to the nature and extent of the business carried on by the plaintiff, he not being entitled to the same amount of damages in a case where his business is small as where it is large. *Ingram* v. *Lawson*, 6 Bing. N. C. 212. Where the libel is contained in a newspaper, evidence is admissible to show the extent of the circulation of the paper, and the consequent injury to the plaintiff. *Gathercole* v. *Miall*, 15 M. & W. 319; and see *Cass* v. *New Orleans Times*, 27 La. Ann. 214.

In general, mere apprehension of future ill consequences cannot constitute special damage. But in an action for a libel upon a copartnership it was held that the jury, in estimating the damages, might take into consideration the prospective injury which might accrue to the firm from the defendant's act. *Gregory* v. *Williams*, 1 Car. & K. 568; see *Goslin* v. *Corry*, 8 Scott N. R. 25; *Pugh* v. *McCarty*, 40 Ga. 444.

Evidence is not admissible in relation to damages to other persons than the plaintiff, although they be also assailed in the libel; as where the libel contains an imputation that the plaintiff keeps a gaming house under the leadership of a woman of notorious character. *Guy* v. *Gregory*, 9 C. & P. 584.

The court will not disturb the verdict on account of the amount of damages unless they are grossly excessive. *Root* v. *King*, 4 Wend. 113; *Sanders* v. *Johnson*, 6 Blackf. (Ind.) 51; *Cassin* v. *Delaney*, 38 N. Y. (11 Tiff.) 178.

If there be no actual injury the jury may find a verdict for nominal damages. *Wakelin* v. *Morris*, 2 F. & F. 26. The report of a company, containing imputations on the plaintiff as manager, was issued to the shareholders and afterward published in a newspaper. It was held that, although privileged as regarded the shareholders, it was not so in respect to its insertion in the newspaper; but that, if the latter publication was made *bona fide* and without malice, the jury would be justified in giving merely nominal damages. *Davis* v. *Cutbush*, 1 F. & F. 487. Where the plaintiff, knowing the defendant's sentiments, procures the publication, he cannot afterward ascribe his loss to the defendant's act, but will be deemed the voluntary author of it. *Rogers* v. *Clifton*, 3 B. & P. 592; S. C., 5 Esp. 15.

ARTICLE III.

OF THE DEFENSES.

Section 1. In general. The defendant may show that the alleged libel was not in fact written and used in an injurious and actionable sense; or that he had nothing to do with its composition or publication; or that it does not relate to the plaintiff; or that, in the delivery of the libel, he acted in honest ignorance of its contents, and did not know, or have any reason to suppose, that the act was illegal. *Underwood* v. *Parks*, Str. 1200; *Mullett* v. *Hulton*, 4 Esp. 248. Where it appeared that five packets addressed to as many different persons, and inclosed in one, which was directed to the defendant, was received at the coach office where he was porter, and that he delivered them, it was held that, although if the jury found that he did so in the course of his business and in ignorance of the contents, he was not liable, yet that it was incumbent upon him to show such ignorance. *Day* v. *Bream*, 2 Mood. & Rob. 54. When the libelous matter is sold by an agent of the defendant, in a shop, in the usual course of business, the defendant may rebut the presumption of a publication with his knowledge and privity by proving that the libel was sold contrary to his orders in his absence, or clandestinely, or when he was confined to his house by sickness, or in prison, to which his agent had no access. *Rex* v. *Almon*, 5 Burr. 2689, per Aston, J.

It may be shown in defense that the plaintiff himself procured the act to be done of which he complains (*King* v. *Waring*, 5 Esp. 13; *Smith* v. *Wood*, 3 Camp. 323; *Weatherston* v. *Hawkins*, 1 Term R. 110); or that the libel was concerning the plaintiff's conduct in an illegal transaction (*Yrisarri* v. *Clement*, 3 Bing. 432); or that the plaintiff's businesss in relation to which the libel was published was illegal. *Hunt* v. *Bell*, 1 Bing. 1; *Manning* v. *Clement*, 7 id. 362.

§ 2. **Privileged communications.** A privileged communication means that the occasion of making it rebuts the *prima facie* inference of malice arising from the publication of matter prejudicial to the character of the plaintiff, and throws upon him the burden of proving malice in fact, but not by proving it by extrinsic evidence only. He has still a right to require that the alleged libel shall be submitted to the jury, that they may judge whether there is evidence of malice on the face of it. *Wright* v. *Woodgate*, 2 Cromp. M. & R. 573; *Saunders* v. *Baxter*, 6 Heisk. (Tenn.) 369. The description of

cases recognized as privileged communications must be understood as founded upon some apparently recognized obligation, legal, moral, or social, which may fairly be presumed to have led to the publication, and, therefore, *prima facie*, relieves it of the implication from which the general rule is deduced. *White* v. *Nicholls*, 3 How. (U. S.) 266; and see *Lucas* v. *Case*, 9 Bush (Ky.), 297. Many of what are called privileged communications are conditionally, not absolutely, privileged; the question being one of good faith or motive, which can only be settled by a jury. The court cannot rule that such a communication is privileged, without assuming the conditions on which it is held to be privileged, namely: that it was made in good faith, for a justifiable purpose, and with a belief, founded on reasonable grounds, of its truth. *Palmer* v. *Concord*, 48 N. H. 217. Whether or not the communication was privileged is a question of law for the court; but whether the defendant fairly and properly conducted himself in the exercise of it is a question of fact for the jury. *Genet* v. *Mitchell*, 7 Johns. 120; *Thomas* v. *Croswell*, id. 264; *Bunton* v. *Worley*, 4 Bibb (Ky.), 38; *Huff* v. *Bennett*, 4 Sandf. (N. Y.) 120; *Briggs* v. *Byrd*, 12 Ired. (N. C.) 377; *White* v. *Carroll*, 42 N. Y. (3 Hand) 161; 1 Am. Rep. 503; see *Carpenter* v. *Bailey*, 56 N. H. 283.

The publication of legislative proceedings, and of memorials and other communications properly relating thereto, is absolutely privileged (*Hare* v. *Mellor*, 3 Lev. 169; *Wason* v. *Walter*, L. R., 4 Q. B. 73; *Lake* v. *King*, 1 Saund. 131; *Coffin* v. *Coffin*, 4 Mass. 1); but not a publication charging a member of the legislature with corruption. *Littlejohn* v. *Greeley*, 13 Abb. Pr. (N. Y.) 41.

Any publication made in the ordinary course of judicial proceedings by judges, magistrates, and others is privileged. The same is true of a correct report of judicial proceedings, although the person complaining of the publication was not a party to the proceedings; and also of an abridged report, if substantially a fair account of what took place. *Andrews* v. *Chapman*, 3 Car. & K. 289; *Torrey* v. *Field*, 10 Vt. 353; *Hill* v. *Miles*, 9 N. H. 9; *Sanders* v. *Rollinson*, 2 Strobh. (S. C.) 447; *Briggs* v. *Byrd*, 12 Ired. (N. C.) 377; *Hartsock* v. *Reddick*, 6 Blackf. (Ind.) 255; *Holt* v. *Parsons*, 23 Texas, 9; *Marsh* v. *Ellsworth*, 50 N. Y. (5 Sick.) 309; *Ackerman* v. *Jones*, 5 J. & Sp. (N. Y.) 42. Where the president of a court-martial, in the opinion of the court which he delivered to the judge-advocate, animadverted in severe terms of censure upon the conduct of an officer who preferred to the court groundless and malicious charges against his commander, it was held privileged. *Jekyll* v. *Moore*, 6 Esp. 63. It is an

established principle upon which the privilege of publishing the report of a judicial proceeding is admitted to rest, that such report must be strictly confined to the actual proceedings in court, and must contain no defamatory observations or comments from any quarter, in addition to what forms strictly and properly the legal proceedings (*Delegall* v. *Highley*, 8 C. & P. 444); but the fact that it is couched in coarser language than is consistent with good taste and decorum will not render it libelous. *Warner* v. *Payne*, 2 Sandf. (N. Y.) 195; *Garr* v. *Selden*, 4 N. Y. (4 Comst.) 91.

A communicatian fairly made in the discharge of a public duty is privileged. *Moore* v. *Butler*, 48 N. H. 161; *Vanwyck* v. *Guthrie*, 4 Duer (N. Y.), 268. Therefore, a complaint submitted to a magistrate for the purpose of enforcing justice against a person accused of crime does not subject the complainant to an action for libel, whether the charge be true or false. *Hartsock* v. *Reddick*, 6 Blackf. (Ind.) 255; *Bailey* v. *Dean*, 5 Barb. 297; *Noonan* v. *Orton*, 32 Wis. 106; *Reid* v. *McLendon*, 44 Ga. 156. It is lawful to publish the testimony of witnesses taken before a committee of congress (*Terry* v. *Fellows*, 21 La. Ann. 375); and where a party, upon a preliminary examination before a magistrate, has been released, an impartial and correct report of the proceedings is privileged. *Duncan* v. *Thwaites*, 3 B. & C. 556. A person may make application by complaint for the removal of an unworthy officer, and, if the complaint be true and made with the honest intention of giving information, and not maliciously, or with intent to defame, the complaint will not be a libel. *Larkin* v. *Noonan*, 19 Wis. 82; see *Carpenter* v. *Bailey*, 56 N. H. 283.

The editor of a newspaper is privileged in commenting fully and freely upon all public questions and matters of general public interest (*Dunne* v. *Anderson*, Ry. & M. 287; *Com.* v. *Featherstone*, 9 Phil. [Penn.] 594); and the public conduct of public men may be discussed with the greatest freedom, provided the language be kept within the limits of an honest intention to discharge a public duty. *Seymour* v. *Butterworth*, 3 F. & F. 372; *Parmiter* v. *Coupland*, 6 M. & W. 107; *Van Wyck* v. *Aspinwall*, 17 N. Y. (3 Smith) 190; *Ogden* v. *Mortimer*, 28 L. T. (N. S.) 801. When any one consents to be a candidate for a public office, he must be considered as putting his character in issue, so far as respects his fitness and qualifications for the office; and publications of the truth on this subject, with the honest intent of informing the people, are not libelous. *Com.* v. *Clap*, 4 Mass. 169; *Com.* v. *Odell*, 3 Pittsb. (Penn.) 449. The editor of a newspaper may lawfully publish the fact that a person has been arrested, and upon what charge. *Usher* v. *Severance*, 20 Me. 9. So comments in

a newspaper upon the report of a trial which has terminated, fairly made, without malice, and founded on the facts, are privileged. *Wason* v. *Walter*, L. R., 4 Q. B. 73; 8 B. & S. 671. Whether an allegation in a divorce bill, which is put upon the files of the court, charging the defendant therein with adultery with another person named, will warrant the publication of the charge by a newspaper as a matter of privilege is questioned in *Scripps* v. *Reilly*, 35 Mich. 371.

A fair criticism of the work of another is privileged (*Carr* v. *Hood*, 1 Camp. 355, note; *Thompson* v. *Shackell*, 1 M. & M. 187; *Tabert* v. *Tipper*, 1 Camp. 350; *Campbell* v. *Spottiswoode*, 3 B. & S. 778; *Hunter* v. *Sharpe*, 4 F. & F. 983; *Swan* v. *Tappan*, 5 Cush. 104); and so likewise is a fair criticism of advertisements, handbills, and placards (*Paris* v. *Levy*, 9 C. B. [N. S.] 342); and also fair comments upon public entertainments (*Dibdin* v. *Bostock*, 1 Esp. 29); or in relation to the conduct and appearance of persons attending a public meeting (*Davis* v. *Duncan*, L. R., 9 C. P. 396; 10 Eng. Rep. 228); and fair and reasonable comments, however severe in terms, may be published in a newspaper concerning any thing which is made by its owner a subject of public exhibition, and are privileged communications for which no action will lie, without proof of actual malice. *Gott* v. *Pulsifer*, 122 Mass. 235.

The general rule is, that a party cannot be held liable for a publication tending to disparage private character, if it is called for by the ordinary exigencies of social duty, or is necessary or proper to enable him to protect his own interest, or that of another, and provided it is made in good faith, and without a willful design to defame. But the privilege does not extend beyond those to whom the party giving the information owes the duty. *Blackham* v. *Pugh*, 2 C. B. 611; 15 L. J. C. P. 290; *Morgan* v. *Lingen*, 8 L. T. (N. S.) 800; *Krebs* v. *Oliver*, 12 Gray, 239; *Sanderlin* v. *Bradstreet*, 46 N. Y. (1 Sick.) 188; 7 Am. Rep. 322; *Klink* v. *Colby*, id. 427; 7 Am. Rep. 360; *Beardsley* v. *Tappan*, 5 Blatchf. (C. C.) 497; *Atwill* v. *Mackintosh*, 120 Mass. 177. An advertisement in a newspaper, though injurious to the character of the persons mentioned in it, is not libelous if it was inserted *bona fide*, with a view of investigating a fact in which the party making it is interested. *Delany* v. *Jones*, 4 Esp. 191. A letter written to persons who employed A as their solicitor, conveying charges injurious to his professional character in the management of certain matters which they had intrusted to him, and in which the writer of the letter was likewise interested, was held not to be a libel, the writer acting *bona fide*, with a view to the interests of himself and the persons whom he addressed. *McDougall* v. *Claridge*, 1 Camp. 267.

A railway company may publish a placard at the stations on their road, giving the name, address, and occupation of a person who has been convicted before a magistrate of any infringement of the company's by-laws, stating the nature of the offense and the punishment. *Briggs* v. *Great Eastern R. R. Co.*, 16 W. R. 908; *Alexander* v. *North Eastern R. R. Co.*, 6 B. & S. 340. And a report of an incorporated society, cautioning the public against trusting a person who had formerly been employed by them to obtain and collect subscriptions, but who had afterward been dismissed, if true, is privileged. *Gassett* v. *Gilbert*, 6 Gray, 94. So a medical society may publish, in good faith, a true account of the proceedings of the society in expelling a member. *Barrows* v. *Bell*, 7 Gray, 301. See *Phila. R. R. Co.* v. *Quigley*, 21 How. (U. S.) 202. A memorial to the post-office department, charging that a successful competitor for proposals has been guilty of fraud and collusion with other bidders, is a privileged communication. *Cook* v. *Hill*, 3 Sandf. (N. Y.) 341. A petition addressed by the creditor of an officer in the army to the secretary of war *bona fide*, and with a view of obtaining through his interference the payment of a debt, and containing a statement of facts, which, though derogatory to the officer's character, the creditor believed to be true, is not a libel for which an action can be maintained. *Fairman* v. *Ives*, 5 Barn. & Ald. 642.

A publication made in the regular course of church discipline, to or of members of the church, is lawful (*Lucas* v. *Case*, 9 Bush [Ky.], 297); but not a publication respecting a stranger, whose character is implicated by it. *Rex* v. *Hart*, 1 W. Bl. 386; *Farnsworth* v. *Storrs*, 5 Cush. 412; *Coombs* v. *Rose*, 8 Blackf. (Ind.) 155; *Streety* v. *Wood*, 15 Barb. 105. See *Remington* v. *Congdon*, 2 Pick. 310; *York* v. *Johnson*, 116 Mass. 482.

Where the writer is acting on any legal or moral duty toward the person to whom he writes, or is bound by his situation to protect the interests of such person, that which he writes under such circumstances is a privileged communication, unless the writer was actuated by malice. *Cockayne* v. *Hodgkisson*, 5 Car. & P. 543. A widow lady being about to marry the plaintiff, her son-in-law wrote her a letter containing imputations on the plaintiff's character, and urging her to make diligent and extensive inquiry as to such character. It was held justifiable, if the jury were satisfied that the defendant acted *bona fide*, although the imputations contained in the letter were false, or based upon erroneous information. Circumstances of this kind should be viewed liberally by juries; and unless they see clearly that there was a

malicious intention of defaming the plaintiff, the defendant should be acquitted. *Todd* v. *Hawkins*, 8 Car. & P. 88.

When a master gives a character of a servant, it will be presumed, in the absence of proof to the contrary, that the character was given in good faith; and the servant to maintain an action must prove that the character given was both false and malicious. *Fountain* v. *Boodle*, 3 Q. B. 11; *Rogers* v. *Clifton*, 3 B. & P. 587; *Dale* v. *Harris*, 109 Mass. 193; *Hatch* v. *Lane*, 105 id. 394. When a master, having given a servant a good character, subsequently discovers that the servant was dishonest, he has a right, and it is his duty, to make known the fact to the person seeking information. *Gardner* v. *Slade*, 13 Q. B. 799; *Fowles* v. *Bowen*, 30 N. Y. (3 Tiff.) 20. But the language used must be such as to negative any inference of malice. *Phila. & C. R. R. Co.* v. *Quigley*, 21 How. (U. S.) 202.

A military man giving evidence before a military court of inquiry, which has no power to administer an oath, is entitled to the same protection as that enjoyed by a witness on oath in an ordinary judicial tribunal. *Dawkins* v. *Rokeby*, L. R., 7 H. L. Cas. 744.

§ 3. **What communications are not privileged.** A publication is not privileged, unless made in pursuance of some public or private duty (*Com.* v. *Featherstone*, 9 Phila. [Penn.] 594); and the privilege does not extend beyond the occasion or person calling for the exercise of the duty. *Sunderlin* v. *Bradstreet*, 46 N. Y. (1 Sick.) 188; 7 Am. Rep. 322. A defamatory writing signed by the chairman of a public meeting, called to select a candidate for governor of the State, and published by order of the meeting, is not privileged. *Lewis* v. *Few*, 5 Johns. 1. If the communication be made maliciously, or is not believed to be true by the party making it, it will not be protected. *Ward* v. *Smith*, 6 Bing. 749; *Tuson* v. *Evans*, 12 Ad. & Ed. 733; 3 P. & D. 396; *Wakefield* v. *Smithwick*, 4 Jones (N. C.), 327; *Fry* v. *Bennett*, 3 Bosw. (N. Y.) 200; *Palmer* v. *Concord*, 48 N. H. 211; *Rector* v. *Smith*, 11 Iowa, 302; *Elam* v. *Badger*, 23 Ill. 498; *Park* v. *Piedmont Life Ins. Co.*, 51 Ga. 510.

The privilege in respect to judicial proceedings does not apply when the court has no jurisdiction (*McGregor* v. *Thwaites*, 3 B. & C. 24; *Perkins* v. *Mitchell*, 31 Barb. 461); nor when the publication relates to a matter not pertinent to the issue. *Torrey* v. *Field*, 10 Vt. 353; *Gilbert* v. *People*, 1 Denio, 41. Where a party, in applying to the court for an extension of time to file a transcript, charged his attorney with having entered into a collusive agreement with the attorney of the adverse party, it was held libelous *per se*. *Wyatt* v. *Buell*, 47 Cal. 624. A publication of calumnious statements, made by

counsel in the trial of a cause, is not privileged. *Saunders* v. *Mills*, 6 Bing. 218. Publishing of a judge that he is wanting in integrity and capacity is actionable. *Robbins* v. *Treadway*, 2 J. J. Marsh. 540; *Matter of Moore*, 63 N. C. 397. The report of a trial is not privileged, unless it gives a true account of the proceedings. *Clement* v. *Lewis*, 3 Brod. & B. 297; 7 Moore, 200; *Flint* v. *Pike*, 4 B. & C. 484; *Sheckell* v. *Jackson*, 10 Cush. 25. It is, therefore, libelous to add to such report the publisher's own observations, in which it is insinuated that the plaintiff committed perjury. *Stiles* v. *Nokes*, 7 East, 493.

Where a person accused of crime, after an examination before a magistrate, has been committed for trial, or held to bail, a report of the proceedings is not privileged. *Lewis* v. *Levy*, El. Bl. & Ell. 537; 27 L. J. Q. B. 282; *Stanley* v. *Webb*, 4 Sandf. (N. Y.) 21. And although it is lawful, to publish in a newspaper the fact that a person has been arrested on a criminal charge, it is libelous to state that such person is guilty. *Usher* v. *Severance*, 20 Me. 9. A newspaper article charging the theft of letters was held not to be actionable in the absence of extrinsic facts going to show the meaning of the article to be a charge of theft by the plaintiff. *Smith* v. *Coe*, 22 Minn. 276.

Editors of newspapers must exercise their right to discuss matters of public interest fairly, without a reckless disregard of private rights. *Snyder* v. *Fulton*, 34 Md. 128; 6 Am. Rep. 314; *Cass* v. *New Orleans Times*, 27 La. Ann. 214; *Smith* v. *Tribune Co.*, 4 Bis. (C. C.) 477; *Joannes* v. *Jennings*, 6 N. Y. Sup. (T. & C.) 138; S. C., 4 Hun, 66. And it will be no defense to a false and defamatory article, that it was taken from another paper (*Curtis* v. *Mussey*, 6 Gray, 261); nor that it was the subject of common report. *Fuller* v. *Dean*, 31 Ala. 654; *Haskins* v. *Lumsden*, 10 Wis. 359. A false and calumnious publication, concerning a candidate for office, is not privileged (*Powers* v. *Dubois*, 17 Wend. 63; *Seely* v. *Blair*, Wright [Ohio], 358; *Com.* v. *Odell*, 3 Pittsb. [Penn.] 449; *Aldrich* v. *Press Printing Co.*, 9 Minn. 133); nor one relative to a person as a member of the legislature, after his term of office has expired (*Cramer* v. *Riggs*, 17 Wend. 209); nor publishing of a politician, that he was paid large sums of money for procuring the appointment of persons to office by the governor (*Weed* v. *Foster*, 11 Barb. 203); nor a false publication concerning the trustee of a mining association, although it relates to a matter of public interest; and is published in good faith, and without malice (*Wilson* v. *Fitch*, 41 Cal. 363); nor a report of speeches and proceedings at vestry meetings (*Davison* v. *Duncan*, 7 Ell. & Bl. 231; *Popham* v. *Pickburn*, 31 L. J. Exch. 133); nor the publication of defamatory remarks, made by a

person under sentence of death, at the place of execution. *Sanford* v. *Bennett*, 24 N. Y. (10 Smith) 20.

Where part of a communication is confidential, and written in good faith, another part foreign to the subject, and defaming an individual, is not privileged. *Warren* v. *Warren*, 1 Cromp. M. & R. 250; *Cole* v. *Wilson*, 18 B. Monr. (Ky.) 212; *Godson* v. *Home*, 1 Brod. & Bing. 7; *Lewis* v. *Chapman*, 16 N. Y. (2 Smith) 369.

§ 4. **Of justification or excuse.** It is a sufficient answer to the action, that the alleged libel is true. *Hawkins* v. *New Orleans Printing, etc., Co.*, 29 La. Ann. 134. This is necessarily the case, for the reason that the falsity of the publication is the foundation of the claim to damages, no person being permitted to recover damages, for a supposed injury to character, which he does not possess. *M'Pherson* v. *Daniels*, 10 B. & C. 272; *Root* v. *King*, 7 Cow. 613; S. C., 4 Wend. 113; *Joannes* v. *Jennings*, 6 N. Y. Sup. (T. & C.) 138; *Rayne* v. *Taylor*, 14 La. Ann. 406; *Perret* v. *Times Newspaper*, 25 id. 170. If the defendant cannot justify, by showing the truth of the matter, he may excuse the publication, by showing that it was made upon a lawful occasion, upon probable cause, and from good motives. The question for the jury in such case is not whether the defendant believed the libel to be true, but whether he had probable cause to believe it. *Carpenter* v. *Bailey*, 53 N. H. 590.

Where the truth of defamatory matter is set up in defense, it must be pleaded specially. *Snyder* v. *Andrews*, 6 Barb. 43; *Hagan* v. *Hendy*, 18 Md. 177. When the libel consists of several charges which are distinct, the defendant may justify as to part. *Clarkson* v. *Lawson*, 6 Bing. 587; *Torrey* v. *Field*, 10 Vt. 353. If the libel be not made up of distinct charges, the justification must embrace the whole charge. *Helsham* v. *Blackwood*, 11 C. B. 111; *Smith* v. *Parker*, 13 M. & W. 459; *Cooper* v. *Barber*, 24 Wend. 105; *Brickett* v. *Davis*, 21 Pick. 404; *Jones* v. *Cecil*, 10 Ark. 592; *Ames* v. *Hazard*, 6 R. I. 335; *Wachter* v. *Quenzer*, 29 N. Y. (2 Tiff.) 547; *Smith* v. *Tribune Co.*, 4 Bis. (C. C.) 477. The justification must be certain; but it need not embrace a forced construction of the libel. *Ames* v. *Hazard*, 8 R. I. 143. The charges must be met directly, and not argumentatively; and according to the sense given to them by the plaintiff. *Fidler* v. *Delavan*, 20 Wend. 57. Where the publication contains specific charges, a general answer that they are true is sufficient. *Vanwyck* v. *Guthrie*, 4 Duer (N. Y.), 268.

The justification must be as broad as the libel. *Brooks* v. *Bemiss*, 8 Johns. 455; *Stow* v. *Converse*, 4 Conn. 17; *Roberts* v. *Miller*, 2 Greene (Iowa), 122; *Whittemore* v. *Weiss*, 33 Mich. 348; *Palmer* v.

Smith, 21 Minn. 419; *Downey* v. *Dillon*, 52 Ind. 442. A charge that the plaintiff was actively and profitably engaged in smuggling during the war, is not justified by showing that he violated the revenue laws in one instance in time of peace. *Stilwell* v. *Barter*, 19 Wend. 487. If the defendant do not prove all the matters of exaggeration set forth in the libel, the verdict must be for the plaintiff, although it be pleaded that the libel is true in substance and in fact. *Edwards* v. *Bell*, 1 Bing. 403. But see *Wearer* v. *Lloyd*, 2 B. & C. 678; 4 Dowl. & Ry. 230; *Morrison* v. *Harmer*, 3 Bing. (N. S.) 759. If the publication charge the plaintiff with crime, proof of his guilt, to amount to a justification, must be strong, and conclusive. Where the libel imputed bigamy to the plaintiff, it was held that the same strictness of proof was necessary, that would have been required on the trial of an indictment for bigamy. *Willmett* v. *Harmer*, 8 C. & P. 695. But the plaintiff need not be proved guilty beyond a reasonable doubt. It is sufficient that there is a mere preponderance of evidence as to his guilt. *Kincade* v. *Bradshaw*, 3 Hawks (N. C.), 63; *Spruil* v. *Cooper*, 16 Ala. 791.

It is not a justification that the charges contained in the libel were the subject of common rumor (*Wheeler* v. *Shields*, 3 Ill. 348); nor that they had been previously published by others (*Fry* v. *Bennett*, 3 Bosw. [N. Y.] 235; *Romayne* v. *Dunne*, 3 Wash. [C. C.] 246; *Cade* v. *Redditt*, 15 La. Ann. 492; *State* v. *Butman*, id. 166); nor that the defendant believed them to be true (*Moore* v. *Stevenson*, 27 Conn. 14); nor that the defendant was not personally acquainted with the plaintiff (*Dexter* v. *Spear*, 4 Mas. [C. C.] 115); nor that he did not know that the publication was a libel, or intend to defame the plaintiff. *Curtis* v. *Mussey*, 6 Gray, 261; *Hotchkiss* v. *Porter*, 30 Conn. 414.

§ 5. **Of mitigation of damages.** Evidence in mitigation must be such as admits that the libel is false. *Cooper* v. *Barber*, 24 Wend. 105. Although, if a publication be libelous and not privileged, the absence of actual malice cannot be proved in bar of the action, yet, the defendant may show the circumstances under which the publication was made, and the motives which induced it, in order to reduce the damages. *Pearson* v. *Le Maitre*, 5 M. & G. 700; 6 Scott, 626; *Smith* v. *Scott*, 2 Car. & Kir. 580; *Lick* v. *Owen*, 47 Cal. 252; *Carpenter* v. *Bailey*, 53 N. H. 590. Where the defendant published a handbill, offering a reward for the recovery of certain bills of exchange, and asserting that the plaintiff was suspected of having embezzled them, it was held competent for the defendant to show that he afterward preferred a charge of embezzlement against the plaintiff, the defense not being that the charge was true, but that it was made in good faith. *Finden* v. *Westlake*, 1 Moo.

& Malk. 461. It may be proved in mitigation of damages that the defendant afterward published a retraction of the libel; but not if the subsequent publication merely put a new construction on the libel. *Hotchkiss* v. *Oliphant*, 2 Hill, 510. The question whether the apology and retraction were explicit and fair is to be determined by the jury. *Risk Allah Bey* v. *Johnstone*, 18 L. T. (N. S.) 620.

The fact that the libel was the subject of general rumor is admissible in mitgation. *Skinner* v. *Powers*, 1 Wend. 451. For this purpose, it is competent for the defendant to prove that the libel had been previously circulated by others, had been generally credited in the community, and that he had nothing to do with its origination. *Rex* v. *Burdett*, 4 B. & Ald. 95; *Binns* v. *Stokes*, 27 Miss. 239. If the libel professes to give a report of the coroner's inquest, what actually took place there may be shown in mitigation of damages. *East* v. *Chapman*, 1 M. & M. 46. So, it may be shown in mitigation, that the defendant copied the libelous matter from a newspaper (*Mullett* v. *Hulton*, 4 Esp. 248; *Saunders* v. *Mills*, 6 Bing. 213; *Hewitt* v. *Pioneer Press Co.*, 23 Minn. 178); or, that he took the libel from another paper and omitted portions of it, which reflected on the character of the plaintiff. *Creevy* v. *Carr*, 7 C. & P. 66. Where the defendant published of the plaintiff that he extorted money, by threatening a third person that he would accuse him of crime, it was held that the defendant might show in mitigation that the person accused did, in fact, complain to a magistrate that the plaintiff and another had conspired to extort money from him by means of said criminal charge, and that the material facts set forth in the libel were, on that occasion, sworn to by such third person, in an affidavit. *Stanley* v. *Webb*, 21 Barb. 148. Previous quarrels between the parties may be shown in mitigation of damages (*Robertson* v. *McDougall*, 4 Bing. 684); also, the publication by the plaintiff of libels connected with the one which is the subject of the action, where it is manifest that they caused the writing of the libel by the defendant, although it does not expressly refer to, or profess to be a reply to them. *May* v. *Brown*, 3 B. & C. 113; *Tarpley* v. *Blabey*, 2 Bing. N. C. 437; *Child* v. *Homer*, 13 Pick. 503; *Hotchkiss* v. *Lothrop*, 1 Johns. 286.

In an action for publishing of the plaintiff that he was a degraded scoundrel, liar and blackguard, it was held that the defendant might show in mitigation that the plaintiff, just before the publication of the libel, charged the defendant with perjury. *Davis* v. *Griffith*, 4 Gill & Johns. (Md.) 342. But a distinct libel, published by the plaintiff concerning the defendant, is not admissible in evidence, in mitigation of damages (*Child* v. *Homer*, 13 Pick. 503); nor a former recovery

of damages by the plaintiff against the defendant, in an action for a libel published in another number of the same paper, and containing the same libelous charges. *Tillotson* v. *Cheetham*, 3 Johns. 56.

Evidence of the plaintiff's general bad character in respect to the subject-matter of the charge is admissible in mitigation of damages. *Melton* v. *State*, 3 Humph. (Tenn.) 389; *Sayre* v. *Sayre*, 1 Dutcher (N. J.), 235; *Smith* v. *Smith*, 8 Ired. (N. C.) 29; *Wright* v. *Schroeder*, 2 Curtis, 548; *Buford* v. *McLuny*, 1 Nott & McCord (S. C.), 268; *Adams* v. *Smith*, 58 Ill. 417. And see *Kimball* v. *Fernandez*, 41 Wis. 329. This may be shown, under the general issue, notwithstanding that there is also a plea in justification. *Young* v. *Bennett*, 4 Scam. (Ill.) 43. And such testimony may be presented, after the plaintiff has introduced evidence to rebut that given by the defendant, in support of his justification. *Stone* v. *Varney*, 7 Metc. 86. But in the absence of a plea of justification, or other plea assailing the character of the plaintiff, or putting it in issue, evidence reflecting thereon should be excluded. *Howe Machine Co.* v. *Souder*, 58 Ga. 64.

Where, in libel, the defendant charges that the plaintiff falsely accused him of crime, and the falsehood of the plaintiff's accusation is shown by the defendant in mitigation of damages, the plaintiff may introduce evidence in rebuttal, to show its truth. *Woodburn* v. *Miller*, Cheves (S. C.), 194.

CHAPTER XC.

LIEN.

TITLE I.

OF LIENS IN GENERAL.

ARTICLE I.

OF LIENS AND THEIR NATURE.

Section 1. Definition and nature. A lien is a right to hold. *Wilson* v. *Balfour*, 2 Camp. 579. It is neither a *jus ad rem*, nor a *jus in re*, but a simple right of retainer. *Meany* v. *Head*, 1 Mas. (C. C.) 319. In common parlance the word *lien* is somewhat indefinitely used, as including every species of special property which one may have in goods, the general ownership of which is in another. But it was originally and more appropriately used to signify the *right of detention*, which artisans and others who had bestowed labor upon an article, or done some act in reference to it, had, in some instances, till reimbursed for their expenditures and labor bestowed thereon. And such may be termed a lien at common law. *Oakes* v. *Moore*, 24 Me. 214. Or, as more comprehensively defined, a lien at common law is the right which one person possesses, in certain cases, of detaining property placed in his possession belonging to another, until some demand which the former has be satisfied. *Hammonds* v. *Barclay*, 2 East, 227; *Bean* v. *Bolton*, 3 Phila. (Penn.) 87. The essence of the right is possession. *Hamlett* v. *Tallman*, 30 Ark. 505.

By the common law, liens exist only in cases where the party entitled thereto has either actual or constructive possession of the property. *Jordan* v. *James*, 5 Ohio, 88; *Shaw* v. *Neale*, 4 Jur. (N. S.) 695. But in the maritime law, and in equity, liens exist independently of possession. *Ex parte Foster*, 2 Story (C. C.), 131. See, also, *Donald* v. *Hewitt*, 33 Ala. 534, 547.

As between debtor and creditor, the doctrine of lien is said to be so equitable that it cannot be favored too much; but as between one class

of creditors and another, there is not the same reason for favor. *Jacobs* v. *Latour*, 5 Bing. 130; 2 Moore & P. 201.

§ 2. **How acquired or created.** Liens exist by common law, or are created by usage, by statute, or by express agreement. *Green* v. *Farmer*, 4 Burr. 2214; S. C., 1 W. Bl. 651; *Allen* v. *Ogden*, 1 Wash. (C. C.) 174; *Frost* v. *Ilsley*, 54 Me. 345; *Jarvis* v. *Rogers*, 15 Mass. 389; *Chambers* v. *Davidson*, L. R., 1 P. C. 296; S. C., 4 Moore's P. C. C. (N. S.) 158; *Driver* v. *Jenkins*, 30 Ark. 120.

Liens which exist by the common law most frequently arise in cases of bailment. The general principle is, that where the law compels a person, such as an innkeeper, or common carrier, to take the care and custody of goods, he shall have a lien on the property for his reasonable and just charges therefor; and the same rule applies to a person who, by his labor and skill, has imparted an additional value to the goods. *Grinnell* v. *Cook*, 3 Hill, 491; *Townsend* v. *Newell*, 14 Pick. 332. But one who merely provides food and takes the care of an animal, as an agistor or a livery-stable keeper, has no lien on the property, unless there be a special agreement to that effect. *Jackson* v. *Cummins*, 5 M. & W. 342; *Lewis* v. *Tyler*, 23 Cal. 364; *Willis* v. *Barrister*, 36 Vt. 220; *Goodrich* v. *Willard*, 7 Gray, 183; *Millikin* v. *Jones*, 77 Ill. 372. Sometimes a lien arises where there is strictly no bailment. Thus, when goods carried at sea are in imminent danger of being lost, it is frequently at the hazard of the lives of those who save them, that they are saved. Therefore, from considerations of public policy and commercial necessity, the law supports a lien in the case of *salvage*. *Nicholson* v. *Chapman*, 2 H. Bl. 254. But the finder of a thing which is lost on land, unlike the salvor of property at sea, has no lien upon it for the recompense which he may reasonably deserve for the trouble and expense incurred in its preservation. *Baker* v. *Hoag*, 7 N. Y. (3 Seld.) 555; *Forster* v. *Juniata Bridge Co.*, 16 Penn. St. 393. Still, if the owner of property lost has offered to any person who should find and restore it, a reasonable compensation for his trouble and expense, and a person, relying upon such promise, undertakes to secure the property, and does in fact rescue it, and is ready to deliver it to the owner upon being paid for his labor and expenses, he is entitled to receive his compensation before he parts with the possession of the property. *Wentworth* v. *Day*, 3 Metc. 352; *Wilson* v. *Guyton*, 8 Gil. (Md.) 213; *Cummings* v. *Gann*, 52 Penn. St. 484. *Ante*, Vol. 1, 100, 101; Vol. 3, 611, 612.

Liens frequently arise from the usages of trade, or the manner of dealing between the parties. *Jarvis* v. *Rogers*, 15 Mass. 389, 394. But it is held that the usage must be so general that the party deliver-

ing the goods may be presumed to have known it, and to have made the right of lien a part of the contract. *Oppenheim* v. *Russell*, 3 Bos. & P. 42, 50; see *Leuckhart* v. *Cooper*, 3 Bing. N. C. 99. And it seems that much stronger proof of general usage is required in those occupations in which there is no choice to accept or reject the employment, as in the occupation of an innkeeper or common carrier. *Rushforth* v. *Hadfield*, 6 East, 519; 7 id. 224; *Kirkman* v. *Shawcross*, 6 Term R. 14. But where a custom has been frequently proved and allowed to exist in any particular trade, the court will not permit it to be disregarded. *Naylor* v. *Mangles*, 1 Esp. 109; *Spears* v. *Hartly*, 3 id. 81; 3 Pars. on Cont. 240. Liens which arise by usage are commonly *general* liens. Id.; see *post*, 319, § 3.

Liens created by statute are usually based upon justice and public convenience and are designed to meet those cases where the possession is not with the consent of the owner of the property, or where exclusive possession is impossible. And the same virtue exists in a statute lien, in which possession does not pass, as exists in common law liens, accompanied by possession. *Grant* v. *Whitwell*, 9 Iowa, 152; *Beall* v. *White*, 94 U. S. (4 Otto) 382. But a lien created by a mere act of legislation has none of the elements or properties of a contract, and may, therefore, be destroyed by an act of legislation. *Martin* v. *Hewitt*, 44 Ala. 418; *Frost* v. *Ilsley*, 54 Me. 345.

That the legislature has the power to authorize hogs and cattle taken damage feasant, to be impounded by the owner of the premises and detained until the damages and costs are paid, and to give such owner a lien on the animals to secure such damages and costs, see *Cook* v. *Gregg*, 46 N. Y. (1 Sick.) 441; *Rood* v. *McCargar*, 49 Cal. 117. A national bank has the power to make a by-law creating a lien on the stock of every stockholder for his liabilities to the bank. *Re Dunkerson*, 4 Biss. 227.

Where a statute provided that any person to whom cattle were intrusted to be pastured should have a lien thereon for their keeping, it was held that an agistor, to whom cattle had been intrusted by the mortgagor of them, without the knowledge or consent of the mortgagee, had no lien on them as against the latter. *Sargent* v. *Usher*, 55 N. H. 287; S. C., 20 Am. Rep. 208.

A lien may be acquired by the express agreement of the parties (*Chapman* v. *Allen*, Cro. Car. 271; *Richards* v. *Symons*, 8 Q. B. 90); as where goods are placed in the hands of a person for the execution of some particular purpose upon them, with an express contract that they shall be considered as a pledge for the labor or expense which the execution of that purpose may occasion. Or it exists where prop-

erty is merely pawned or delivered for bare custody to another, for the sole purpose of being a security for a loan made to the owner on the credit of it. Whitaker on Liens, 27. See *post*, tit. *Pledge*. And where a number of tradesmen enter into an agreement not to receive goods of any one, for the purposes of their trade, unless such goods may be held subject to a general lien for the balance due them, and a bailor with notice of this agreement leaves his goods, the lien attaches. *Kirkman* v. *Shawcross*, 6 Term R. 14. But it is otherwise where the tradesman is obliged by law to receive the goods of any one who offers; in such case, *express* assent of the bailor must be shown, in order to give the lien. Mere notice is insufficient. Id. And see *Oppenheim* v. *Russell*, 3 Bos. & P. 42.

When a party has a lien on goods or chattels, created by a valid verbal agreement with the owner, and the goods have been delivered to him pursuant to the terms of the contract, his right to retain them until his lien is satisfied is not affected by any subsequent mortgage, or other incumbrance, executed or created by the owner; and he may maintain *detinue* against any one who disturbs his possession. *Gafford* v. *Stearns*, 51 Ala. 434. *Ante*, Vol. 2, 535.

Personal, and even transitory and fluctuating property, may be the subject of a lien, at the pleasure of the contracting parties; but generally, explicit words are necessary to effect a lien, where it is not raised by operation of law or equity. *Williams* v. *Price*, 5 Munf. (Va.) 507. Under a written contract to keep sheep for a certain period, and to wash, shear, and do up their wool, for a certain sum, the keeper has no lien on the sheep for his pay. *Cummings* v. *Harris*, 3 Vt. 245. A contract for a lien on an unplanted crop is void at law. *Hamlett* v. *Tallman*, 30 Ark. 505. But see *ante*, Vol. 2, 171, and *post*, 325.

It is a well-settled doctrine of the common law that, in order to create a lien on a chattel, the party claiming it must show the just possession of the thing claimed; and no lien exists where the party claiming it acquires possession by wrong, or by misrepresentation. *Madden* v. *Kempster*, 1 Camp. 12; *Lempriere* v. *Pasley*, 2 Term R. 485. Thus, one who, in order to obtain the wrongful possession of property, pays the claim of a person having a lien upon it, acquires thereby no lien to the property for the sum so paid, as against the rightful owner. *Guilford* v. *Smith*, 30 Vt. 49. Nor can a lien arise, where, from the nature of the contract between the parties, it would be inconsistent with the express terms, or the clear intent of the contract. For example, if the goods were deposited in the possession of the party for a particular purpose, inconsistent with the notion of a lien, as to hold them or the proceeds for the owner, or a third person.

Taylor v. *Robinson*, 8 Taunt. 648; *Gray* v. *Wilson*, 9 Watts (Penn.), 512; *Tunno* v. *Bethune*, 2 Desaus. (S. C.) 285; *Randel* v. *Brown*, 2 How. (U. S.) 406. And a lien cannot attach upon personal property in favor of a person who has advanced money for it, without having either title or possession. *Reed* v. *Ash*, 3 Nev. 116; *Allen* v. *Shortridge*, 1 Duv. (Ky.) 34.

Where a constable levied on certain property under a judgment in favor of the defendant, against the plaintiff, and committed the property to the defendant as a receiptor, it was held that the latter acquired a valid lien upon the property, for his just and lawful charges as such. *Aliger* v. *Keeler*, 8 Hun (N. Y.), 125.

§ 3. **General liens.** A general lien is a right to retain the property of another on account of a general balance due from the owner. 2 Bouv. Dic. 47; 2 Kent's Comm. 634. The law does not favor general liens, and a general lien can only be claimed as arising from dealings in a particular trade or line of business, such as wharfingers, factors and bankers, in which the existence of a general lien has been judicially acknowledged, or in other trades where there is express evidence of custom. *Bock* v. *Gorrissen*, 2 DeG., F. & J. 434; S. C., 7 Jur. (N. S.) 81. See, also, *Bleaden* v. *Hancock*, 4 Carr. & P. 152; *Rushforth* v. *Hadfield*, 6 East, 519; 7 id. 224. It has long been settled, that wherever a banker has advanced money to another, he has a lien upon all the paper securities which are in his hands, for the amount of his general balance, unless such securities were delivered to him under a particular agreement. *Scott* v. *Franklin*, 15 East, 428; *Baltimore, etc., R. R. Co.* v. *Wheeler*, 18 Md. 372; *Bank of Metropolis* v. *New England Bank*, 1 How. (U. S.) 234; 17 Pet. 174. The right of factors to a general lien for the balance due upon all goods of the principal, in their possession, is well established. *Kruger* v. *Wilcox*, Ambl. 252; *Davis* v. *Bradley*, 28 Vt. 118; *Sewall* v. *Nicholls*, 34 Me. 582; *Schiffer* v. *Feagin*, 51 Ala. 335; *Dixon* v. *Stansfeld*, 11 Eng. Law and Eq. 528. *Ante*, Vol. 3, 301. And the rights of a wharfinger are regarded as co-extensive with those of a factor. *Spears* v. *Hartly*, 3 Esp. 81; *Rex* v. *Humphrey*, 1 McClel. & Y. 188. A warehouseman's lien extends to all demands for storage and expenses paid which he may have against the owner who deposits the goods with him. *Scott* v. *Jester*, 13 Ark. 437; *Low* v. *Martin*, 18 Ill. 286; *Buxton* v. *Baughan*, 6 Carr. & P. 674.

Among tradesmen in England, who, by custom, have a general lien upon all an employer's goods, for the general balance due for work, may be mentioned calico-printers, packers, fullers, in some localities (*Weldon* v. *Gould*, 3 Esp. 268; *Green* v. *Farmer*, 4 Burr. 2222; *Ex*

parte Deeze, 1 Atk. 228; *Plaice* v. *Allcock*, 4 F. & F. 1074); and perhaps dyers. *Kirkman* v. *Shawcross*, 6 T. R. 14; *Savill* v. *Barchard*, 4 Esp. 53. But see *Bennett* v. *Johnson*, 2 Chitt. 455; 3 Dougl. 387.

§ 4. **Particular liens.** A particular lien is a right to retain the property of another on account of labor performed or expenses bestowed, or incurred upon the identical property detained. 2 Kent's Com. 634. Particular liens constitute the oldest class of liens, and they are the most favored at common law. *Green* v. *Farmer*, 4 Burr. 2214; *Richardson* v. *Goss*, 3 Bos. & P. 126; *McIntyre* v. *Carver*, 2 Watts & Serg. 392. Generally speaking, if a chattel delivered to a party receives improvement from his labor and skill, he has a specific lien upon it for his remuneration, whether the contract for it is express or implied; provided, however, there is nothing in the nature of the contract inconsistent with the existence of a lien. *Scarfe* v. *Morgan*, 4 M. & W. 270; S. C., 1 H. & H. 292; *Townsend* v. *Newell*, 14 Pick. 332. And a workman having bestowed his labor on a chattel, in consideration of a price, the amount of which was fixed by an agreement with the owner, may detain such chattel until the price is paid, although it was delivered to the workman in different parcels and at different times, if the work to be done under the agreement is entire. *Chase* v. *Westmore*, 5 Maule & Sel. 180. But a workman who, in the exercise of his right of lien, detains a chattel upon which he has expended his labor and material, has no claim against the owner for taking care of the chattel, nor for storage while so detained. *Somes* v. *British Empire Shipping Co.*, 8 H. L. Cas. 338; affirming S. C., El., Bl.& El. 367; *McIntyre* v *Carver*, 2 Watts & Serg. 392.

§ 5. **Equitable liens.** There are liens recognized in equity, which are neither known nor enforced at law, and in respect to which courts of equity exercise an extensive jurisdiction. *Gladstone* v. *Birley*, 2 Merriv. 401, 403. These liens arise from constructive trusts, and are, therefore, wholly independent of the possession of the thing to which they are attached, as a charge or incumbrance, and they can be enforced only in a court of equity. 2 Story's Eq. Jur., § 1217; *Neate* v. *Duke of Marlborough*, 3 Myl. & Cr. 407, 415. To constitute an equitable lien, it must be founded on a valuable and adequate consideration; but what will be a sufficient consideration must depend upon the circumstances of each case. *Eaton* v. *Patterson*, 2 Stew. & P. (Ala.) 9. See *ante*, Vol. 3, 148.

A strong illustration of a lien created and sustained in equity, but unknown at law, is seen in cases of the sale of lands, where a lien exists for the unpaid purchase-money. The doctrine, generally stated, is that the vendor of land who has taken no security, although he has

made an absolute conveyance by deed, with a formal acknowledgment, in the deed or on the back of it, that the consideration has been paid, retains an equitable lien for the purchase-money, unless there has been an express or implied waiver in discharge of it; and this lien will be enforced in equity against the vendee, volunteers, and all others claiming under him, with notice, that is: against all persons except *bona fide* purchasers for valuable consideration, without notice. *Mackreth* v. *Symmons*, 15 Ves. 329. See *ante*, vol. III, 148. Such is the doctrine of the English courts of chancery, and the same doctrine has been adopted in many of the States of the Union, as will be seen by consulting the following decisions: *Gordon* v. *Bell*, 50 Ala. 213; *Holman* v. *Patterson*, 29 Ark. 357; *Burt* v. *Wilson*, 28 Cal. 632; *Francis* v. *Wells*, 2 Col. 660; *Johnson* v. *McGrew*, 42 Iowa, 555; *Walton* v. *Hargroves*, 42 Miss. 18; *Richards* v. *Fisher*, 8 W. Va. 55; *Stafford* v. *Van Rensselaer*, 9 Cow. 316; *Ledforth* v. *Smith*, 6 Bush (Ky.), 129; *Briscoe* v. *Bronaugh*, 1 Tex. 325; *Marsh* v. *Turner*, 4 Mo. 253; *Ross* v. *Whitson*, 6 Yerg. (Tenn.) 50; *Williams* v. *Roberts*, 5 Ohio, 35; *Carr* v. *Hobbs*, 11 Md. 285; *Deibler* v. *Barwick*, 4 Blackf. (Ind.) 339; *Dyer* v. *Martin*, 4 Scam. (Ill.) 146. See, also, *Gilman* v. *Brown*, 1 Mas. (C. C.) 191; S. C., 4 Wheat. 256; *Chilton* v. *Braiden*, 2 Black. (U. S.) 458. But in other of the States the doctrine has been condemned and abandoned. Thus, the whole principle has been rejected in Pennsylvania (*Hepburn* v. *Snyder*, 3 Penn. St. 72); in North Carolina (*Womble* v. *Battle*, 3 Ired. [N. C.] Eq. 182); and South Carolina. *Wragg* v. *Comptroller-General*, 2 Dessaus. (S C.) 509. And the doctrine does not appear to have ever been adopted in any of the New England States except Vermont, in which, after being affirmed by the court (see *Manly* v. *Slason*, 21 Vt. 271), it has since been abolished by the legislature. Stats. of Vt. 1862, chap. 65, § 33. See *Philbrook* v. *Delano*, 29 Me. 410; *Arlin* v. *Brown*, 44 N. H. 102; *Atwood* v. *Vincent*, 17 Conn. 576; *Perry* v. *Grant*, 10 R. I. 334. In those States, the vendor of real estate by an absolute deed has no lien thereon for the unpaid purchase-money, without a written agreement of the parties to that effect. *Ahrend* v. *Odiorne*, 118 Mass. 261; S. C., 19 Am. Rep. 449. So the English doctrine of the vendor's lien has no existence in Kansas (*Brown* v. *Simpson*, 4 Kans. 76. See *Smith* v. *Rowland*, 13 id. 245); and it has been abolished in Virginia by statute (*Yancey* v. *Mauck*, 15 Gratt. 300); and in some of the courts in which the existence of the doctrine has been recognized, it has been considered as a dangerous principle, and one opposed to the prevailing policy of this country, which discourages secret liens, and tends to make all matters of title the subject of record evidence. See *Bayley*

v. *Greenleaf*, 7 Wheat. 46; *Conover* v. *Warren*, 1 Gilm. (Ill.) 498, 502; *McCandlish* v. *Keen*, 13 Gratt. (Va.) 615.

The vendor's equitable lien attaches if possession of the estate has been delivered to the purchaser, although there has been no conveyance of it to him (*Smith* v. *Hibbard*, 2 Dick. 730; *Andrew* v. *Andrew*, 8 DeG. M. & G. 336; *Langstaff* v. *Nicholson*, 25 Beav. 160); and it attaches upon copyholds and leaseholds, as well as freeholds. *Wrout* v. *Dawes*, 25 id. 369; *Richardson* v. *Bowman*, 40 Miss. 782. In England, the vendor of land to a railway company has been held to have a lien in respect of unpaid compensation as well as purchase-money, unless such compensation is the subject of a separate agreement between him and the company. *Walker* v. *Ware, etc., Railway Co.*, L. R., 1 Eq. 195. See, also, *Bishop of Winchester* v. *Mid Hants Railway Co.*, L. R., 5 Eq. 17; *Earl St. Germans* v. *Chrystal Palace Railway Co.*, L. R., 11 id. 568. And see *Dubois* v. *Hull*, 43 Barb. 26. So, the rule as to the vendor's lien applies with as much force to the case of a purchase by a married woman as to any other case. *Chilton* v. *Braiden*, 2 Black (U. S.), 458; *Armstrong* v. *Ross*, 20 N. J. Eq. 109; *Pylant* v. *Reeves*, 53 Ala. 132. But the lien will not be given by a court of equity as a security for unliquidated and uncertain damages (*Payne* v. *Avery*, 21 Mich. 524; *Arlin* v. *Brown*, 44 N. H. 102); and it will not, therefore, exist where the consideration of the sale is an engagement to support the vendor during his life. Id.; *McCandrish* v. *Keen*, 13 Gratt. (Va.) 615. Thus where a vendee, by his bond reciting the conveyance of the land to him as the consideration of such bond, covenanted to maintain the vendor and his son during their natural lives, it was held that the covenant was the substituted consideration for the purchase-money, and that the bond was not an equitable incumbrance on the land in behalf, either of the obligee or of his son, who was only a beneficiary. *McKillip* v. *McKillip*, 8 Barb. 552. It has likewise been held that a lien will not arise from the exchange of land for chattels, or for other land. *Coit* v. *Fougera*, 36 Barb. 195. But it was said in *Burns* v. *Taylor*, 23 Ala. 255, that there is nothing to distinguish an exchange of lands, so far as respects the application of this principle of lien for the purchase-money, from a sale of lands. And a vendor who is fraudulently induced to take land instead of the money, for which he originally agreed, may treat the payment as a nullity and enforce his lien. *Bradley* v. *Bosley*, 1 Barb. Ch. 125. And see *Mills* v. *Bliss*, 55 N. Y. (10 Sick.) 139. And it has been held, that the vendor will not necessarily lose his lien by stipulating that the price shall be paid to a third person.

Hamilton v. *Gilbert*, 2 Heisk. (Tenn.) 681; *Gault* v. *Trumbo*, 17 B. Monr. (Ky.) 682. But see *Chapman* v. *Beardsley*, 31 Conn. 115.

It may now be regarded as a well-settled rule that, wherever the vendor's lien is recognized at all, it is not waived, in the absence of an express agreement to that effect, by the taking of the note or other personal security of the vendee for the purchase-money. *Winter* v. *Anson*, 3 Russ. 488; *Ex parte Peake*, 1 Madd. 346; *Gilman* v. *Brown*, 1 Mas. (C. C.) 192, 214; *Christian* v. *Austin*, 36 Tex. 540; *Selby* v. *Stanley*, 4 Minn. 65; *Garson* v. *Green*, 1 Johns. Ch. 308; *Pinchain* v. *Collard*, 13 Tex. 333; *Dunlap* v. *Shanklin*, 10 W. Va. 662; *Denny* v. *Steakly*, 2 Heisk. (Tenn.) 156. But it is waived by the taking of a distinct and independent security, unless there is at the time an express agreement for its retention. Id.; *Baum* v. *Grigsby*, 21 Cal. 172. And see *In re Albert Life Assurance Co.*, L. R., 11 Eq. 178. Thus, taking the bond or note of the vendee with a a surety (*Carrico* v. *Merchants', etc., National Bank*, 33 Md. 235; *Boon* v. *Murphy*, 6 Blackf. [Ind.] 273); or taking a negotiable note drawn by the vendee and indorsed by a third person, or drawn by a third person and indorsed by the vendee (*Boynton* v. *Champlin*, 42 Ill. 57; *Sanders* v. *McAffee*, 41 Ga. 684; *Duretta* v. *Briggs*, 47 Mo. 356; *Schwarz* v. *Stein*, 29 Md. 112; *Yaryan* v. *Shriner*, 26 Ind. 364); or taking a mortgage of other property (*White* v. *Dougherty*, Mart. & Y. (Tenn.) 309), presumptively repels the lien. Id. And see *Richardson* v. *Ridgely*, 8 Gill & Johns. (Md.) 87; *Marshall* v. *Christmas*, 3 Humph. (Tenn.) 616; *Kirkham* v. *Boston*, 67 Ill. 599; *Perry* v. *Grant*, 10 R. I. 334. An express security on the land itself for the whole amount unpaid, as by mortgage or deed of trust, will likewise merge the implied lien. *Mattix* v. *Weand*, 19 Ind. 151; *Little* v. *Brown*, 2 Leigh (Va.), 353. But see *Boos* v. *Ewing*, 17 Ohio, 500. And an express security or an express contract for a lien on the land conveyed, as to part of the amount remaining unpaid, will be an implied waiver of the lien to any greater extent. *Fish* v. *Howland*, 1 Paige, 20, 30; *Brown* v. *Gilman*, 4 Wheat. 256. It has been held, that taking a mortgage for the purchase-money excludes the lien, although the security is defective or inadequate. *Camden* v. *Vail*, 23 Cal. 633. But taking a mortgage or other collateral security will not extinguish the lien where there is an express agreement that it shall survive. *Daughaday* v. *Paine*, 6 Minn. 443. And, generally, whether there has been a waiver of a vendor's lien is a question of intention. Thus, if a vendor take a note for the purchase-money with security, it raises a presumption of a waiver, because, ordinarily, it evinces an intention to rely on the personal security and to abandon the lien; but,

if the attendant circumstances or the positive testimony of the vendor show that such was not his intent, the presumption is rebutted. *Cordova* v. *Hood*, 17 Wall. 1; *Mims* v. *Macon, etc., R. R. Co.*, 3 Kelly (Ga.), 333; *Campbell* v. *Baldwin*, 2 Humph. (Tenn.) 248. And see *Brown* v. *Christie*, 35 Tex. 689; *Skinner* v. *Purnell*, 52 Mo. 97; *Napier* v. *Jones*, 47 Ala. 90.

Upon the question whether the benefit of the vendor's equity, or implied lien, accompanies an assignment of the vendee's note or bond for the purchase-money, the decisions are conflicting. In some of the States, there is no distinction made between the vendor's implied lien and any express lien, as to transferability, and the assignment of the note or bond for the purchase-money is held to carry the lien with it. See *Fisher* v. *Johnson*, 5 Ind. 492; *Honore* v. *Bakewell*, 6 B. Monr. (Ky.) 67; *Rakestraw* v. *Hamilton*, 14 Iowa, 147; *Wells* v. *Morrow*, 38 Ala. 125. But, according to the weight of authority elsewhere, the vendor's lien is a mere personal equitable right in the vendor, and is not assignable. It looks only to the security of the vendor, and does not pass to the assignee of the vendee's obligation for the consideration-money, and, consequently, cannot be enforced in his favor. See *Webb* v. *Robinson*, 14 Ga. 216; *Simpson* v. *Montgomery*, 25 Ark. 365; *Baum* v. *Grigsby*, 21 Cal. 173; *Walsh* v. *Boyle*, 30 Md. 262; *Sheratz* v. *Nichodemus*, 7 Yerg. (Tenn.) 9; *Horton* v. *Horner*, 14 Ohio, 437; *Lindsey* v. *Bates*, 42 Miss. 397; *Ross* v. *Heintzen*, 36 Cal. 313; *Hecht* v. *Spears*, 27 Ark. 229; 11 Am. Rep. 784; *Keith* v. *Horner*, 32 Ill. 526. But a third person who pays the purchase-money on behalf of the purchaser to the vendor, upon an express agreement between the three that he shall have a lien for it upon the land, will be held in equity to succeed to the vendor's lien. *Mitchell* v. *Butt*, 45 Ga. 162. In a recent case in New York it is held that the vendor's lien is capable of being assigned with the debt, for the payment of which it is a security; but that the lien ceases to exist whenever the acts of the vendor manifest that it is not relied upon. Hence, if he so assigns the debt as to have no further interest in its payment, and omits to assign the lien in terms, the lien is destroyed. *Smith* v. *Smith*, 9 Abb. (N. S.) 420. See *White* v. *Williams*, 1 Paige, 502; *Hallock* v. *Smith*, 3 Barb. 267.

The vendor of personal property has no implied or equitable lien for the purchase-money after parting with the possession, but must look alone to the personal responsibility of the vendee (*James* v. *Bird*, 8 Leigh [Va.], 510; *Lupin* v. *Marie*, 6 Wend. 77), even though the latter was insolvent and knew he was unable to pay (*Johnson* v. *Farnum*, 56 Ga. 144); and still less does such a lien exist in favor of a surety of the vendee, who fears that he may be compelled to pay the price. *Beam*

v. *Blanton*, 3 Ired. (N. C.) Eq. 59. Where real and personal property are sold under an entire contract for a gross sum, there will be no lien, even as it regards the land. *McCandlish* v. *Keen*, 13 Gratt. 605. But it is otherwise where it appears that the land and the chattels were valued separately, though conveyed by the same deed. *Russell* v. *McCormick*, 45 Ala. 587; 6 Am. Rep. 707.

Where a mortgage is executed on an unplanted crop, a lien attaches, in equity, as soon as the subject of the mortgage comes into existence. *Apperson* v. *Moore*, 30 Ark. 56; S. C., 21 Am. Rep. 170. See, also, *Butt* v. *Ellett*, 19 Wall. 544. And one who furnishes money and supplies to another to make a crop, under a verbal agreement that he is to have a lien on the crop to be raised, of which he is in possession at the institution of the suit, acquires, in equity, a lien which that court will enforce, there being no adequate remedy at law. *Driver* v. *Jenkins*, 30 Ark. 120. See *ante*, 318.

Where the equitable owner of land erected a granary thereon, and afterward allowed his two sons to use and occupy them, and they erected other buildings thereon at a great expense, it was held that the sons had a lien on the premises for their outlay. *Unity, etc., Banking Association* v. *King*, 25 Beav. 72; S. C., 4 Jur. (N. S.) 470.

§ 6. **Liens in favor of particular trades, business, or persons.** The doctrine of a particular or specific lien on goods in the hands of a tradesman or artisan for the price of work done on them, is a part of the common law, which has grown necessarily and naturally out of the transactions of mankind, as a matter of public policy. Originally, such lien seems to have been only co-extensive with the workman's obligation to receive the goods; but it has for a long time been extended to the case of every bailee who has, by his labor or skill, conferred value on the thing bailed to him. *Chapman* v. *Allen*, Cro. Car. 271; *Scarfe* v. *Morgan*, 4 M. & W. 270; *Wilson* v. *Martin*, 40 N. H. 88; *McIntyre* v. *Carver*, 2 Watts & Serg. 392. But as an exclusive right to the possession of the thing is the basis of such a lien (see *ante*, 315, § 1), it is held not to exist in favor of a journeyman or day-laborer, whose possession is that of his employer, and who has no other security for his wages than the employer's personal responsibility on the contract of hiring. He who claims the lien must, therefore, be a bailee under the contract technically termed *locatio operis faciendi*. *M'Intyre* v. *Carver*, 2 Watts & Serg. 392.

An innkeeper has a lien upon the property of his guest for his food and lodging, and he may detain the horse of a guest for the price of provender and stabling. See Vol. 4, p. 10. And see, as to the lien of an innkeeper under New York statute, Laws of 1869, ch. 738. A far-

rier also has a lien for his services in keeping and curing a horse received by him for that purpose. *Lane* v. *Cotton*, 1 Ld. Raym. 654; *Lord* v. *Jones*, 24 Me. 439. And the lien of a blacksmith for shoeing a horse is recognized. *Cummings* v. *Harris*, 3 Vt. 245; *Hoover* v. *Epler*, 52 Penn. St. 522. But stablers who are not innkeepers have no lien upon the horses which they are employed to keep (*Sanderson* v. *Bell*, 2 Cr. & M. 304; *McDonald* v. *Bennett*, 45 Iowa, 456; *Miller* v. *Marston*, 35 Me. 153); nor, as we have seen (*ante*, 320, § 4), does any lien exist at common law in favor of agistors. See, also, *ante*, vol. 3, 617; *Bissell* v. *Pearce*, 28 N. Y. (1 Tiff.) 252. A stabler has, however, a lien for the labor and skill employed on a horse sent to him for the purpose of being trained (*Bevan* v. *Waters*, 3 Car. & P. 520; *Forth* v. *Simpson*, 13 Q. B. 680); and he likewise has a lien upon a mare sent to his stable to be covered by a stallion. *Scarfe* v. *Morgan*, 4 M. & W. 270; S. C., 1 H. & H. 292.

A carrier has a special lien at common law, and he may have, by express contract, or by general usage, a general lien for the balance due him by the owner. *Wright* v. *Snell*, 5 B. & Ald. 350. And see *ante*, vol. 2, p. 60. Warehousemen have a lien on property stored by them, for proper charges; they stand, in this respect, upon the same footing as carriers or artisans. *Low* v. *Martin*, 18 Ill. 286. But a warehouseman cannot retain the goods of the principal for a debt due to him by the agent. *Wesling* v. *Noonan*, 31 Miss. 599. And one not engaged in the business of warehousing or storage, who allows the chattels of another to be placed in his room, does not thereby acquire any lien for storage. *Alt* v. *Weidenberg*, 6 Bosw. (N. Y.) 176. Tailors have a particular lien on the cloth for the value of their work (*Hussey* v. *Christie*, 9 East, 426); the vendor of goods has a lien on them for the price, so long as he retains possession (*Parks* v. *Hall*, 2 Pick. 206; *Boyd* v. *Mosely*, 2 Swan [Tenn.], 661); an attorney has a lien for his costs (see *ante*, vol. 1, 453, 454, tit. Attorneys); and clerks of courts, for their fees (*Taylor* v. *Lewis*, 2 Ves. Sen. 111); pawnees have a lien, from the very nature of their contract (see *post*, tit. *Pledge*); and it is held that printers and publishers have a lien on works for the charge for printing, but not upon the stereotype plates put into their hands for that purpose (*Bleaden* v. *Hancock*, 4 Car. & P. 152); unless they have paid the cost of the plates, in which case they may hold them for money thus paid. Id.; 2 Pars. on Cont. 256. A delivery to a common carrier for the consignee, and an acceptance by him for the consignee, are said to be sufficient to give the consignee a lien. *Wade* v. *Hamilton*, 30 Ga. 450. See, also, *Elliott* v. *Cox*, 48 id. 39. But a consignee

of goods to be sold on commission has no lien upon them until they are delivered to him. *Bruce* v. *Andrews*, 36 Mo. 593.

In England, a packer has by custom of trade a general lien upon all the goods of a customer in his possession or in his hands for all moneys due to him from that customer, and not merely for money owing in respect of those particular goods. *Ex parte Shubrook*, L. R., 2 Ch. Div. 489.

A person who has advanced money to another to carry on business has no lien upon the proceeds of such business. *Miller* v. *Price*, 20 Wis. 117. See, also, *Weathersby* v. *Sleeper*, 42 Miss. 732.

The lien of the mechanic, known as a mechanic's lien, is exclusively the creature of statute. *Grant* v. *Vandercook*, 8 Abb. Pr. (N. S. N. Y.) 455. The principle embraced in the statute is founded in natural justice, that the party, who has enhanced the value of the property by incorporating therein his labor or materials, shall have security on the same, though changed in form, and inseparable from the property. *Taggard* v. *Buckmore*, 42 Me. 77. But however equitable the claim may be, the lien does not exist, unless the party brings himself within the provisions of the statute, and shows a substantial compliance with all its essential requirements. *Spencer* v. *Barnett*, 35 N. Y. (8 Tiff.) 96; *Greene* v. *Ely*, 2 Greene (Iowa), 508; *Noll* v. *Swineford*, 6 Penn. St. 187; *Dore* v. *Sellers*, 27 Cal. 588. The statutes upon the subject widely vary in the different States, and the numerous cases arising under such statutes generally turn upon local provisions. The statute and the decisions of the particular State should, therefore, be consulted.

§ 7. **Operation and effect of lien.** A party having a lien upon goods may transfer the possession of the goods, subject to the lien, to a third person, who may lawfully hold the property until the lien is paid. But if the transferee sell the goods, the owner is remitted to his original rights, freed from the lien, and may bring trover against the transferee for them. *Nash* v. *Mosher*, 19 Wend. 431. But a party to whom the owner of a lien upon property has executed an assignment of the lien, without a delivery of the property to which it has attached, has no claim against a person who obtains possession of the property subsequently to the assignment. *Wing* v. *Griffin*, 1 E. D. Smith (N. Y.), 162. A lien cannot be assigned, while the assignor retains possession of the property charged therewith. Id.

Where a lien is created by statute, and the lien itself, as well as the estate against which it is sought to be enforced, is purely legal, a court of equity has no authority to extend the lien to cases not provided for by the statute. *Buchan* v. *Sumner*, 2 Barb. Ch. 165. The lien of the

United States for duties is restricted to the specific goods on which the duties have accrued. *Dennie* v. *Harris*, 9 Pick. 364.

A lien created by contract, and reserved on the face of the conveyance, is regarded as a specific lien, forming an original substantive charge upon the estate thus conveyed, and as affecting all persons who may, subsequently, come into possession of the estate with notice, either actual or constructive, of its existence. *Lincoln* v. *Purcell*, 2 Head (Tenn.), 143. Such a lien differs from, and possesses greater efficacy than the vendor's lien, properly so called. Id. See *ante*, 320, § 5.

A lien lost or destroyed is the same as if it had never existed. *Pharis* v. *Leachman*, 20 Ala. 662.

§ 8. **Incidents of the right.** In general, a lien confers no right of sale upon the person having such lien, although the retention of the chattel may be attended with expense. *Hunt* v. *Haskell*, 24 Me. 339; *Thames Ironworks Co.* v. *Patent Derrick Co.*, 1 Johns. & H. 93; *Coit* v. *Waples*, 1 Minn. 134, 148. *Ante*, vol. 3, 424, 427. And where the lien arises by operation of law, the bailee has no right to use the thing (*Mores* v. *Conham*, Owen, 123); but if it arise by act of party, he may use it as the owner would, unless it will be the worse for use. But the property will be at the risk of the bailee while in use. *Rex* v. *Cording*, 1 Nev. & M. 35; *Coggs* v. *Bernard*, 2 Ld. Raym. 909.

Property in the hands of a person having a lien thereon cannot be taken from him under an attachment against the general owner. He has a right to retain it, until discharged of the lien; and if it be wrongfully taken away, he may maintain an action against the seizing officer for the tort. *Smith* v. *Goss*, 1 Camp. 282. He may, however, waive his right, and if he does, it is no objection in the mouth of the general owner. *Meeker* v. *Wilson*, 1 Gall. (C. C.) 419.

It has been held that a shipping agent who has a lien on a bill of lading of goods which he has shipped may, if the lien is not satisfied before the goods have reached their destination, have them brought home in order to retain his lien on them, and is not liable to an action for so doing. *Edwards* v. *Southgate*, 10 W. R. 528.

Where it is provided by statute that the holder of a lien shall do certain acts in order to preserve his lien beyond a certain term, the performance of such acts may be waived by the parties, and the lien, as between them, will be valid. *Wallace's Appeal*, 5 Penn. St. 103.

If the general owner alienate the property while it is in the possession of the party holding under the lien, the effect will not be to divest it, since the alienee must take subject to the incumbrance. *Godin* v. *London Assurance Co.*, 1 Burr. 489. And it is well settled that property, held by virtue of a lien, cannot be seized on an execution

against the lien holder. *Leg* v. *Evans*, 6 Mees. & W. 36; *Harding* v. *Stevenson*, 6 H. & J. 264; *Kittredge* v. *Sumner*, 11 Pick. 50; *Meany* v. *Head*, 1 Mas. (C. C.) 319.

A lien acquired under an illegal contract, if an executed one, may be good; as for instance, a lien arising under a contract made in violation of the Sunday laws. *Searfe* v. *Morgan*, 4 Mees. & W. 270. And see *Boynton* v. *Page*, 13 Wend. 425. The maxim, *in pari delicto*, would be applicable in such case, should the bailor seek a legal remedy. But where the illegality is solely attributable to the misconduct of the party seeking to establish the right of lien, and is of a nature to invalidate the contract which he would enforce, the lien will not be sustained. *Strong* v. *Hart*, 6 B. & C. 160; S. C., 9 D. & R. 189; *Fergusson* v. *Norman*, 5 Bing. N. C. 76; 2 Pars. on Cont. 245.

§ 9. **Duration of the lien.** We have seen that continuance of possession is essential to the existence of a lien at law. *Ante*, 315, § 1; *Kitteridge* v. *Freeman*, 48 Vt. 62; *Black* v. *Bogert*, 65 N. Y. (20 Sick.) 601. But possession by an agent or servant, acting under the authority of a party having a lien, is sufficient to preserve the lien. *McFarland* v. *Wheeler*, 26 Wend. 467, 474. And in cases where the party is deprived of his possession by force or fraud, or against his will, the lien is not lost. *Grinnell* v. *Cook*, 3 Hill, 493. It is only between the claimant and third persons that continued possession is essential, because possession by the owner might enable him to defraud others ignorant of the lien. As between the owner and the holder of the lien, possession is by no means essential (*McFarland* v. *Wheeler*, 26 Wend. 467, 474), except when, by surrendering the possession, the claimant can be fairly understood to have surrendered his lien; and then the question is not whether he has yielded his possession, but whether he has voluntarily surrendered his lien. *Allen* v. *Spencer*, Edm. Sel. Cas. (N. Y.) 117.

Where a lien has been lost by lapse of time, it is not revived and continued by an act, passed after the time has elapsed, granting a lien in such cases for a longer time. *Steamboat Thompson* v. *Lewis*, 31 Ala. 497.

In general, a party cannot be divested of his prior lien except by fraud or deception in its creation. *Briggs* v. *Planters' Bank*, 1 Freem. (Miss.) Ch. 574.

§ 10. **Priority of lien.** It is stated as a universal rule that a prior lien gives a prior claim, which is entitled to prior satisfaction, out of the subject it binds, unless the lien be intrinsically defective, or be displaced by some act of the party holding it which shall postpone him, in a court of law or equity, to a subsequent claimant. *Rankin* v.

Scott, 12 Wheat. 177. And it is held that a title derived under a lien elder in its origin is *prima facie* superior to a title from a common source, purporting to be derived under a lien junior in point of time, although the judicial sale under the latter may have preceded the sale under the former. Id.; *Littlefield* v. *Nichols*, 42 Cal. 372.

One who, in good faith, purchases brick or other ponderous chattels, for their full value, and pays for them by discharging the just debts of the true owner, may hold them against the owner's other creditors, who have not a prior specific lien, although the purchase was formally made and a bill of sale taken from a claimant other than the true owner. *Lum* v. *Hoag*, 31 Wis. 687. So, it is held that the lien of an arbitrator for his fees, upon land which is the subject of his award, takes precedence of a mortgage executed by the person in whose favor the award is made after the date of the award, but before it is entered on the minutes of the court. *Miller* v. *Fisk*, 47 Ga. 270.

A specific equitable lien upon land is preferred to a subsequent legal lien by judgment. *Stevens* v. *Watson*, 4 Abb. Ct. App. (N. Y.) 302; S. C., 45 How. 104. But it is otherwise, where the judgment is one confessed to secure money advanced on the faith of it by the judgment creditor. *Hulett* v. *Whipple*, 58 Barb. 224. And where the equitable lien and the judgment lien come into existence at the same time, the former is not entitled to preference unless it was created on a new consideration advanced on the faith of it. *Dwight* v. *Newell*, 3 N. Y. (3 Comst.) 185. A lien created by the trust deed of an insolvent, in favor of the creditors, is superior to the landlord's lien for rent. *Repplier* v. *Buck*, 5 B. Monr. (Ky.) 96. So, the lien of a warehouseman and factor who had made advances on cotton produced on rented land, and stored with him by the tenant, was held to be superior to that of the landlord for rent, or of a merchant for fertilizers sold to the debtor. *Clark* v. *Dobbins*, 52 Ga. 656. See *Smith* v. *Fouche*, 55 id. 120.

If property on which machinery is constructed was subject to an incumbrance prior to the commencement of the building in which the machinery was placed, the lien given to the mechanic furnishing the machinery will be deferred to the prior incumbrance. *McKim* v. *Mason*, 3 Md. Ch. 186.

In a recent case in Tennessee, it is held that the equitable lien of the vendor of land for the unpaid purchase-money is subordinate to a specific lien acquired by a creditor of the vendee, whether with or without notice, before proceedings are instituted to enforce such equitable lien. *Fain* v. *Inman*, 6 Heisk. (Tenn.) 5; S. C., 19 Am. Rep.

577. See, also, *Bayley* v. *Greenleaf*, 7 Wheat. 46. See *ante*, 320, § 5, and cases cited.

§ 11. **Enforcement of lien.** A lien given by the common law is only a mode of enforcing satisfaction by the mere passive holding of the creditor and thus preventing the debtor from deriving any benefit from his own until he renders justice where it is due. It is a sort of *distringas* to which certain creditors may have recourse without the previous sanction of a court of justice. *Ridgely* v. *Iglehart*, 3 Bland's (Md.) Ch. 540. See, also, *Meany* v. *Head*, 1 Mas. (C. C.) 319; *Sullivan* v. *Park*, 33 Me. 438. A statutory mode of enforcing a purely legal lien exists, however, in the different States, and upon this point the statute of the particular State should be consulted. A statutory lien can be enforced only so far as it is clearly given by the law. *Succession of Rousseau*, 23 La. Ann. 1. And see *Jacobs* v. *Knapp*, 50 N. H. 71. A lien upon property belonging to the United States cannot be enforced by the courts by means of a suit against the government, nor by a proceeding *in rem*, when possession of the property can only be obtained by taking it out of the actual possession of officers or agents of the government. *Briggs* v. *The Light Boats*, 11 Allen, 157; *The Siren*, 7 Wall. 152. Yet, a lien may exist and may be enforced whenever enforcement does not disturb the possession of the government. Id.; *Brown* v. *Stapyleton*, 4 Bing. 119; *United States* v. *Wilder*, 3 Sumn. (C. C.) 308. Thus, where government property was in charge of a carrier, on board ship for transportation, and while in transit became liable for salvage service, and on arrival in port, and before any delivery to the officers of the government, the goods were libeled for salvage, and taken into possession by the marshal — it was held that the court should have enforced a lien. *The Davis*, 10 Wall. 15. It is held in Alabama that a statute lien created in another State, on personal property, cannot be enforced in the former State, as against a *bona fide* purchaser. *Marsh* v. *Elsworth*, 37 Ala. 85.

A court of equity will enforce an equitable lien, which cannot be enforced at law. *Vallette* v. *Whitewater Valley Canal Co.*, 4 McLean (C C.), 192; *Cairo, etc., R. R. Co.* v. *Fackney*, 78 Ill. 116. And the usual course of enforcing a lien in equity, if not discharged, is by a sale of the property to which it is attached. *Neate* v. *Duke of Marlborough*, 3 Myl. & Cr. 407, 415; 2 Story's Eq. Jur., § 1217. Where several creditors have liens on the same property, and one of them has also a lien on other property, equity will compel him to subject the latter first to the satisfaction of his claim. *Fassett* v. *Traber*, 20 Ohio, 540; *Smith* v. *Grimes*, 43 Iowa, 356; *McLean* v. *Lafayette*

Bank, 3 McLean (C. C.), 587; *Bruner's Appeal*, 7 Watts & Serg. 269. See *Poston* v. *Eubank*, 3 J. J. Marsh. (Ky.) 47. And although it is a general rule that between equities, equal in other respects, the elder shall be preferred, yet, if the lien be secret, and another has made advances on the property, in good faith, and without notice, and has had possession thereof, his equity will be preferred. *Cox* v. *Romine*, 9 Gratt. (Va.) 27. Where a person has a lien on a bond which the obligee has obtained by collusion with the obligor, his only remedy is in equity. *Harrison* v. *Burgess*, 5 T. B. Monr. (Ky.) 417.

The vendor, having an equitable lien for unpaid purchase-money, may file a bill in equity to have satisfaction of it, and the court will order the land, or so much of it as may be necessary, to be sold for the discharge of the debt. *Wilson* v. *Davisson*, 2 Rob. (Va.) 385; *Outton* v. *Mitchell*, 4 Bibb (Ky.), 239; *Mullikin* v. *Mullikin*, 1 Bland's (Md.) Ch. 538. But the bill must show that the complainant has exhausted his remedy at law against the personal estate, or it must aver such facts as show that the complainant cannot have a full, complete and adequate remedy at law. *Stevens* v. *Hurt*, 17 Ind. 141; *Ford* v. *Smith*, 1 MacArthur, 592; *Eyler* v. *Crabbs*, 2 Md. 137. Some of the courts, however, regard the vendor's lien as in the nature of a mortgage, and hold that the vendor may enforce his claim in equity without having obtained a judgment, or taken any steps whatever at law. *Sparks* v *Hess*, 15 Cal. 186; *Hill* v. *Grigsby*, 32 id. 56; *High* v. *Batte*, 10 Yerg. (Tenn.) 186; *Richardson* v. *Baker*, 5 J. J. Marsh. (Ky.) 323; *Smith* v. *Rowland*, 13 Kan. 245. Where there is an unexecuted contract of sale, the vendor may file his bill to have a specific performance, and then have the land sold for satisfaction of the lien. *Clark* v. *Hall*, 7 Paige, 382; *Brush* v. *Kinsley*, 14 Ohio, 20.

Where a person purchases property subject to a lien in the hands of his vendor, and converts it into money by a sale thereof, the money thus received becomes a trust fund in equity, liable to discharge the lien. *Ellett* v. *Tyler*, 41 Ill. 449.

§ 12. **Lien when waived.** See, as to waiver of equitable lien, *ante*, 320, § 5. What constitutes the waiver of a lien is to be determined from the circumstances of each particular case. *Mims* v. *Macon, etc., R. R. Co.*, 3 Ga. 333. And see *Buckley* v. *Handy*, 2 Miles (Penn.), 449. A lien may be waived by a party who sets up a claim to retain the chattel upon a different ground, and makes no mention of the lien. *Weeks* v. *Goode*, 6 C. B. (N. S.) 367; *Boardman* v. *Sill*, 1 Camp. 410, *n.* A tacit lien will be deemed waived by unreasonable delay in enforcing it. *The Bolivar*, Olc. Adm. 474. See *Eschbach* v. *Pitts*, 6 Md. 71. So, a lien is waived if the parties subsequently enter into any special

agreement inconsistent with the existence of the lien. *Pickett* v. *Bullock*, 52 N. H. 354. And an express contract that the lien shall be retained to a specified extent is equivalent to a waivor of that lien to any greater extent. *Brown* v. *Gilman*, 4 Wheat. 255. If a party refuse, upon demand made, to deliver up property without setting up any lien thereon, he thereby waives the right to set up a lien afterward. *Thatcher* v. *Harlan*, 2 Houst. (Del.) 178; *Hanna* v. *Phelps*, 7 Ind. 21; *Dows* v. *Moorewood*, 10 Barb. 183. But see *Everett* v. *Coffin*, 6 Wend. 603; *White* v. *Gainer*, 2 Bing. 23; S. C., 9 Moore, 41; 1 Car. & P. 324.

It was formerly held, that a common-law lien was waived by a special agreement as to the price to be paid the bailee for the service to be performed upon the property. *Chase* v. *Westmore*, 5 Maule & Sel. 180. But it is now settled that, in order to operate as a waiver, the special agreement must be inconsistent with the lien itself; merely fixing the price is no waiver. *Hutton* v. *Bragg*, 7 Taunt. 14.

§ 13. **Discharge or determination.** A lien is lost or determined, by voluntarily parting with the possession of the property (*King* v. *Indian Orchard Canal Co.*, 11 Cush. 231; *Bailey* v. *Quint*, 22 Vt. 474), or by any agreement to give it up. *Danforth* v. *Pratt*, 42 Me. 50. But such agreement, in order to be obligatory, must be based on a legal consideration; and a promise to pay the debt of another, when not in writing, is void by the statute of frauds, and furnishes no consideration for such agreement. Id. But see *Castling* v. *Aubert*, 2 East, 325; *Houlditch* v. *Milne*, 3 Esp. 86. So, a lien *created by contract* is not discharged by permitting the general owner or his assignee to take possession of the property, if it may be done consistently with the contract, and the course of business, and the intention of the parties. *Spaulding* v. *Adams*, 32 Me. 211; *Robinson* v. *Larrabee*, 63 id. 116.

If a security is taken for a debt for which the party has a lien upon property of the debtor, such security being payable at a distant day, the lien is gone. *Hewison* v. *Guthrie*, 2 Bing. N. C. 755; S. C., 2 Hodges, 54. Even where labor is bestowed on articles under an agreement to receive a note in payment, the lien on them is waived; and where there was no such antecedent agreement, the subsequent taking of a negotiable note waives the lien. *Hutchins* v. *Olcutt*, 4 Vt. 549. See *Bunney* v. *Poyntz*, 4 B. & Ad. 568; S. C., 1 Nev. & M. 229; *Castle* v. *Sworder*, 6 Hurl. & N. 828; *Johnston* v. *Union Bank*, 37 Miss. 526. But, as a general rule, a mere change in the form of the evidence of indebtedness will not operate to discharge a lien given to secure a debt, unless it is apparent that the parties intended to extinguish

the lien. *Lewis* v. *Starke*, 18 Miss. 120. See, also, *Clark* v. *Draper*, 19 N. H. 419; *Muir* v. *Cross*, 10 B. Monr. (Ky.) 277; *Succession of Kercheval*, 14 La. Ann. 457; *Thorpe Brothers* v. *Durbon*, 45 Iowa, 192.

If a party having a lien on goods causes them to be taken in execution at his own suit, he thereby destroys his right of lien, although the goods were never removed from his premises. *Jacobs* v. *Latour*, 5 Bing. 130; S. C., 2 M. & P. 201. See *Outcalt* v. *Durling*, 25 N. J. Law, 443; *Evans* v. *Warren*, 122 Mass. 303. And a lien will be destroyed not only by parting with possession, but by attempting to retain it otherwise than as security. *Bean* v. *Bolton*, 3 Phil. (Penn.) 87. Thus, if a person has a lien on goods for the price of carriage to a place of deposit, his subsequently claiming them as his own, and refusing, on that ground, to deliver them to the owner, is a waiver of the lien. *Picquet* v. *M'Kay*, 2 Blackf. (Ind.) 465. So, if a party has a specific lien on the goods of another, and, when required to deliver them up, claims a lien upon them for a sum either greater than or different from that for which he is entitled to hold them, his lien is gone (*Scarfe* v. *Morgan*, 4 Mees. & W. 270; S. C., 1 H. & H. 292), but if he claims to hold them both for the sum to which he is entitled, and also for a further sum to which he is not entitled, his lien in respect of the former remains, and the owner ought, on such refusal, to tender that sum. Id. Where a party claims to detain goods upon two causes of lien, in such a way as to dispense with tender of either, he is guilty of a conversion, unless he can sustain both. *Kerford* v. *Mondel*, 28 L. J. Exch. 303. And where a party who has a specific lien on goods refuses to deliver them up, unless the amount of a general balance is paid, it is unnecessary for the owner to tender the sum due in respect of those goods, in order to support trover. *Jones* v. *Tarleton*, 9 Mees. & W. 675.

So, if A delivers a chattel to B, under a contract by the latter to perform certain work thereon at a fixed price, and, before such work is completed, A countermands the order and demands the chattel from B, at the same time tendering a sum sufficient to pay for the work actually done, he will be entitled to maintain trover therefor without tendering the contract price. *Lilley* v. *Barnsley*, 1 Car. & K. 344.

If A, having repaired a carriage for B, allows him to take it away from time to time, he cannot afterward detain it for the amount of the repairs. *Hartley* v. *Hitchcock*, 1 Stark. 408. So, a lien for the keeping of a horse, created by agreement, will not hold against a mortgage subsequently executed and recorded, if the owner is afterward permitted to use the horse at his pleasure. *Perkins* v. *Boardman*, 14

Gray, 481. But under a statute of Pennsylvania, giving a lien to livery-stable keepers, it is held that where it is a part of the ordinary course of business to deliver the horses to the driver as often as they are needed, the loss of custody does not defeat the stable keeper's lien. *Young* v. *Kimball*, 23 Penn. St. 193.

If, on a sale of property subject to a lien, the holder of the lien agrees to pay for the property a sum additional to the amount of such lien, the sale is an extinguishment of the lien. *Foltz* v. *Peters*, 16 Ind. 244. And where a note is given for a debt, a part of which is secured by a lien, and a part not so secured, and the note is prosecuted to judgment, the lien is lost. *Coburn* v. *Kerswell*, 35 Me. 126.

A sale made to enforce a statutory lien divests the property sold of that lien. *Schmidt* v. *Gatewood*, 2 Rich. (S. C.) Eq. 162.

But a specific lien, once obtained by levy or otherwise, cannot be divested by subsequent legislation. *McKeithan* v. *Terry*, 64 N. C. 25; *Sluder* v. *Rogers*, id. 289. And it is held that the mere manual delivery of an article by a carrier to the consignee does not, of itself, operate necessarily to discharge the lien of the carrier for freight; but the delivery must be made with the intent of parting with the lien. *One hundred and fifty-one Tons of Coal*, 4 Blatchf. (C. C.) 368.

A lien on property is not removed by the bankruptcy of the party. *Roach* v. *Bennett*, 24 Miss. 98.

A client cannot compromise a case out of court, so as to deprive his attorney of his lien for his fee without his consent. *Pleasants* v. *Kortrecht*, 5 Heisk. (Tenn.) 694. See, also, *Hunt* v. *McClanahan*, 1 id. 503.

§ 14. **Who may sue for injury to.** While property remains in the possession of the bailee, who is entitled to, and still maintains his lien thereon, he alone can maintain an action of trespass for a forcible injury to the property. *Wilson* v. *Martin*, 40 N. H. 88. And when a party holds a lien on property which he claims is wrongfully in the possession of a third party, he is entitled to an action for the recovery of its possession, or for a wrongful conversion. *Wingard* v. *Banning*, 39 Cal. 543; *Gafford* v. *Stearns*, 51 Ala. 434. And the general owner may maintain an action of trover for the conversion of the property (*Nash* v. *Mosher*, 19 Wend 431); and a wrong-doer cannot set up the lien which a bailee has for the price of labor done on the goods of another, to defeat the action of the owner. *Bradley* v. *Spofford*, 23 N. H. 444.

§ 15. **Who may be sued for injury to.** Trespass by the party holding the lien, for a forcible injury to the property, has been sus-

tained even against the general owner. *Cowing* v. *Snow*, 11 Mass. 415.

§ 16. **Damages recoverable.** In an action by the lien-holder, to recover the possession or for a wrongful conversion of the property to which the lien attaches, the measure of damages is stated to be the amount of the lien, not exceeding the value of the property. *Wingard* v. *Banning*, 39 Cal. 543.

A tender of the charges must be made before suit by the owner, where a lien exists, unless the goods have been parted with, in which latter case all that can be claimed by the defendant is a mitigation of damages by way of recoupment. *Saltus* v. *Everett*, 20 Wend. 267. See *ante*, Vol. 2, 431.

CHAPTER XCI.

MALICIOUS PROSECUTION.

ARTICLE I.

OF THE ACTION IN GENERAL.

Section 1. Nature of the action and where it lies. The action for malicious prosecution belongs, as its name indicates, to a class of actions in which malice is the principal element, and it lies to recover the damages sustained by the plaintiff by reason of a prior action having been brought against him by the defendant, from malicious motives and without probable cause.

An action brought in the name of another person, without his authority, is a groundless and unlawful suit, and for the damage done to the defendant in such a suit, he may recover against the person by whom it was brought. *Foster* v. *Dow*, 29 Me. 442. *Ante*, Vol. 1, 37, 143. The criminal law was not designed to assist in the collection of debts, and he who attempts to so use it must expect to smart for it. *Kelley* v. *Sage*, 12 Kans. 109, 112. *Post*, 346, 347.

The original action or prosecution may have been either civil or criminal, but in either case, in order to sustain an action to recover the damages resulting from such action or prosecution, it must affirmatively appear that it was prosecuted through malicious motives, and without probable cause. *Cook* v. *Walker*, 30 Ga. 519; *Dickinson* v. *Maynard*, 20 La. Ann. 66; *Heyne* v. *Blair*, 62 N. Y. (17 Sick.) 19; *Medcalfe* v. *Brooklyn Life Ins. Co.*, 45 Md. 198; *Burris* v. *North*, 64 Mo 426; *Scott* v. *Shelor*, 28 Gratt. 891; *Glaze* v. *Whitley*, 5 Oregon, 164; *Willis* v. *Knox*, 5 S. C. 474; *Harkrader* v. *Moore*, 44 Cal. 174; *Dietz* v. *Langfitt*, 63 Penn. St. 234; *Burnap* v. *Albert*, Taney, 244.

It must also appear that such original action or prosecution had been terminated by a judgment or adjudication in the plaintiff's favor, or had been abandoned before the commencement of the action to recover the damages resulting from the prosecution. *O'Brien* v. *Barry*, 106 Mass. 300; S. C., 8 Am. Rep. 329; *Brown* v. *Randall*, 36 Conn. 56;

S. C., 4 Am. Rep. 35; *Cardival* v. *Smith*, 109 Mass. 158; S. C., 12 Am. Rep. 682; *Hall* v. *Fisher*, 20 Barb. 441; *Hamilburgh* v. *Shepard*, 119 Mass. 30; *Gillespie* v. *Hudson*, 11 Kans. 163; *Feltt* v. *Davis*, 49 Vt. 151; *Batchelder* v. *Frank*, 49 id. 90; *Hibbing* v. *Hyde*, 50 Cal. 206; *Moulton* v. *Beecher*, 1 Abb. N. C. 192; 52 How. 182. *Post*, 347, § 6.

Wherever these three essentials concur, and a malicious and unfounded prosecution has been commenced and terminated, an action to recover the damages resulting therefrom is maintainable. As to this, there is no conflict of authorities. It remains, then, to be considered what character and extent of legal interference with the rights of another will support the action; what is deemed want of probable cause, and how that want is evidenced; what degree of malice must underlie the original prosecution; what is a sufficient determination of such prosecution to give the right of action; who must be made plaintiff or defendant in the action to recover the damages sustained; and, finally, what damages are recoverable.

§ 2. **Wrongfully prosecuting a criminal action.** If a person maliciously and without any reasonable or probable cause puts the criminal law in force, and thereby another person is prejudiced or injured in property or person, there is such a conjunction of injury and loss as to lay the foundation for an action to recover the damages arising from the wrongful act. *Churchill* v. *Siggers*, 3 El. & Bl. 937.

An action for malicious prosecution lies, when a person, knowing that a certain act does not constitute a crime, procures the indictment of another for such act as a crime. *Dennis* v. *Ryan*, 5 Lans. (N. Y.) 350; S. C., 65 N. Y. (20 Sick.) 385; 63 Barb. 145.

So, the action lies when a person, believing that an act would constitute a crime, falsely and maliciously accuses the other of such act and procures his indictment or arrest. *Dennis* v. *Ryan*, 5 Lans. (N. Y.) 350; S. C., 63 Barb. 145; 65 N. Y. (20 Sick.) 385; *Shaul* v. *Brown*, 28 Iowa, 37; S. C., 4 Am. Rep. 151; 1 Am. Lead. Cas. 281; *Anderson* v. *Buchanan*, Wright (Ohio), 725; *Farlie* v. *Danks*, 20 Eng. Law & Eq. 115; *Streight* v. *Bell*, 37 Ind. 550; *Collins* v. *Love*, 7 Blackf. 416; *Barton* v. *Kavanaugh*, 12 La. Ann. 332.

So where a person falsely and maliciously prosecutes another for a crime before a court having no jurisdiction of the offense, an action for malicious prosecution will lie. *Morris* v. *Scott*, 21 Wend. 281; *Sweet* v. *Negus*, 30 Mich. 406; *Stone* v. *Stevens*, 12 Conn. 219; *Hays* v. *Younglove*, 7 B. Monr. 545. But *contra*, see *Painter* v. *Ives*, 4 Nebr. 122; *Bodwell* v. *Osgood*, 3 Pick. 379, 383; *Turpin* v. *Remy*, 3 Blackf. 210.

So, an action for malicious prosecution may be founded on an indictment upon which no acquittal could be had, as, for example, one rejected by the grand jury, or *coram non judice*, or insufficiently drawn. *Stancliff* v. *Palmeter*, 18 Ind. 321; *Chambers* v. *Robinson*, 2 Strange, 691; *Wicks* v. *Fentham*, 4 Term R. 247; *Pippet* v. *Hearn*, 5 B. & Ald. 634.

Thus, where there is a criminal prosecution, whether commenced by information or indictment, which distinctly charges a specific offense, if commenced maliciously and without probable cause, it affords the same ground of action upon the same proof, whether the statement of facts alleged to constitute the offense is sufficient or insufficient; and it is no defense that the information or indictment was defective or insufficient either in substance or form. *Shaul* v. *Brown*, 28 Iowa, 37, S. C., 4 Am. Rep. 151.

But where a person in good faith makes a true statement of the facts which he believes constitutes a crime to a district attorney, grand jury, magistrate or criminal tribunal, and upon this statement another person is indicted or prosecuted, an action for malicious prosecution will not lie against the complainant, although the act complained of constituted no crime, as he has not been guilty of any wrongful act, the injury to the party prosecuted resulting from judicial error only. *Dennis* v. *Ryan*, 65 N. Y. (20 Sick.) 385, 388; *McNeely* v. *Driskill*, 2 Blackf. 259; *Leigh* v. *Webb*, 3 Esp. 165; *Bennett* v. *Black*, 1 Stew. (Ala.) 494; *Wyatt* v. *White*, 5 H. & N. 371; 29 Law J. Exch. 193. And see *Cohen* v. *Morgan*, 6 Dowl. & R. 8.

If a person prosecutes another for perjury in swearing to that which could not amount to perjury, for the reason that it is immaterial, an action for malicious prosecution will lie although the defendant prove the falsity of the matters sworn to by the plaintiff. *Smith* v. *Deaver*, 4 Jones' Law (N. C.), 513.

An action on the case will lie for advising and procuring a third person to institute a malicious prosecution. *Mowry* v. *Miller*, 3 Leigh. (Va.), 561; *Perdu* v. *Connerly*, 1 Rice (S. C.), 49.

An action or prosecution may be commenced in good faith, and yet, facts arising during its progress may render its further continuance malicious. Thus, when a person, in good faith, commences a criminal prosecution, and afterward acquires positive knowledge of the innocence of the accused, but nevertheless perseveres in the prosecution with the intention of wrongfully procuring a conviction, an action for malicious prosecution will lie. *Fitzjohn* v. *Mackinder*, 9 C. B. (N. S.) 505; S. C., 30 L. J. C. P. 264. And see *Cole* v. *Curtiss*, 16 Minn. 182.

But when the proceedings charged to be malicious were not commenced by the defendant, and have only been continued by him, his responsibility commences at the point at which he became cognizant of the proceedings; and there is a material distinction between instituting a prosecution, and merely attending a hearing upon a proceeding already commenced. It does not at all follow that the defendant, by attending the hearing, adopts the proceeding, or renders himself responsible for the motives or actions of the person who instituted it, although that person may be an agent of the defendant. *Weston* v. *Beeman*, 27 L. J. Exch. 57. It is not necessary, however, that the defendant in an action for malicious prosecution should be the originator of the prosecution. It is enough to render him liable in damages that he voluntarily participated in the prosecution, and that it was carried on with his countenance and approbation, if the jury find the other facts fixing his liability. *Stansbury* v. *Fogle*, 37 Md. 369.

As to the character or extent of a criminal prosecution that will sustain an action for malicious prosecution, it has been held sufficient that a charge of crime has been made to the proper officer or tribunal, with intent that it be entertained and acted upon as a charge of such crime. *Weston* v. *Beeman*, 27 L. J. Exch. 57.

The action lies after a criminal prosecution begun, though no indictment has been preferred. *Shock* v. *McChesney*, 2 Yeates (Penn.), 473. Thus, if a warrant is sued out from a justice of the peace on an accusation of larceny, an action for malicious prosecution will lie, although the warrant is not placed in an officer's hands nor further proceeded on. *Holmes* v. *Johnson*, Busbee's Law (N. C.), 44.

On the other hand, it has been held that a complaint presented to a magistrate which results in his sending a letter to the accused, requesting him to call and explain the charge, is not a ground for malicious prosecution, although the charge was maliciously made. *Newfield* v. *Copperman*, 15 Abb. Pr. [N. S.] 360; S. C., 47 How. 87. And it has been held that an information before a magistrate does not constitute such a commencement of a prosecution as to enable the person informed against to maintain an action for malicious prosecution (*Heyward* v. *Cuthbert*, 4 McCord [S. C.], 354); and that the action will not lie if the accusation complained of was not made in the ordinary and regular course of justice, and before a tribunal having power to ascertain the truth or falsity of the charge, and to punish the supposed offender. *Bodwell* v. *Osgood*, 3 Pick. 379, 383. And see *Turpin* v. *Remy*, 3 Blackf. 210.

One who maliciously, and without probable cause, institutes or procures to be instituted against another an inquisition of lunacy, is liable

to the latter on his discharge, in an action for malicious prosecution, for all damages suffered by him in excess of the taxable costs of such proceeding. *Lockenour* v. *Sides*, 57 Ind. 360.

§ 3. **Wrongfully prosecuting a civil action.** In England it is a settled principle of law, that if one man prosecutes a civil action against another maliciously, and without reasonable or probable cause, an action for the resulting damages is not maintainable. *Beauchamp* v. *Croft*, Keilw. 26. It is there held that there is a great difference between the bringing of a mere civil action, and indicting maliciously and without probable cause; that a person who fancies he has a cause of action may sue and put forward his claim, however false and unfounded it may be; that if unsuccessful the statute will give the defendant costs; but the defendant upon indictment has no remedy but to reimburse himself by action.

But even there, where an action had been brought, with malice and without probable cause, for mere vexation, and the defendant had sustained some particular damage thereby, he might have his action. *Savile* v. *Roberts*, 1 Ld. Raym. 374; 1 Salk. 13.

And there seems to be no conflict of authorities, that where any thing is done maliciously beside commencing and prosecuting a malicious or vexatious action, a suit for the damages sustained by such act may be maintained. Before the statute of Marlbridge, allowing costs in civil actions, if a suit terminated in favor of the defendant, he might support an action on the case against the plaintiff if the proceeding was malicious and without probable cause. 3 Chitty's Bla. 125; Co. Litt. 161; *Webster* v. *Haigh*, 2 Lev. 210; *Goslin* v. *Wilcock*, 2 Wils. 302, 305; Styles, 379; Hob. 266; *Waterer* v. *Freeman*, id. 205.

And in this country it has been held that the principle of the common law recognized by the English courts before the statutes allowing costs to defendants, and which gave a remedy for injuries sustained by reason of suits which were malicious and without probable cause, is and ought to be operative still, and affords a remedy in all such cases where the taxation of costs is not an adequate compensation for the damage sustained; and that where a civil suit is commenced by summons or attachment, and is terminated in favor of the defendant, the plaintiff in such suit is liable to the defendant in an action on the case for the damages sustained by him in the defense of such suit in excess of the taxable costs obtained by him. *Closson* v. *Staples*, 42 Vt. 209; S. C., 1 Am. Rep. 316.

It is not essential to sustain such action that the person prosecuted maliciously was arrested in the action, or that his property has been

attached. *Whipple* v. *Fuller*, 11 Conn. 581. See *Vanduzor* v. *Linderman*, 10 Johns. 106; *Pangburn* v. *Bull*, 1 Wend. 345; *Marbourg* v. *Smith*, 11 Kan. 554.

It is well settled in this country that if one maliciously and without probable cause sue out a civil process against another, although in regular and legal form, and cause him to be arrested and imprisoned, the prosecutor is answerable in damages for the tort in an action for false and malicious imprisonment. *Watkins* v. *Baird*, 6 Mass. 506, 512; *Hayden* v. *Shed*, 11 id. 500; *Lindsay* v. *Larned*, 17 id. 190; *Stone* v. *Swift*, 4 Pick. 389.

So, if a person falsely and maliciously sue out an attachment against the property of another to his injury, he is answerable for the damages sustained, although in fact the owner of the property seized was indebted to him. *Tomlinson* v. *Warner*, 9 Ham. (Ohio) 103; *Fortman* v. *Rottier*, 8 Ohio (N. S.), 548. *Ante*, Vol. 1, 426, 428.

So, it is enough to sustain the action for malicious prosecution that the defendant has maliciously made the affidavit for procuring the attachment without further intervention on his part. *Walser* v. *Thies*, 56 Mo. 89. Provided, however, that the plaintiff show malice on the part of the defendant, want of probable cause, and damage. *Preston* v. *Cooper*, 1 Dill. (C. C.) 589; *Fullenwider* v. *McWilliams*, 7 Bush (Ky.), 389; *Burkhart* v. *Jennings*, 2 W. Va. 242. *Ante*, Vol. 1, 428.

The action will not lie for suing out an attachment, if it was done without malice or any disposition to vex or harass, and under an honest belief that there was probable cause. *Benson* v. *McCoy*, 36 Ala. 710. *Ante*, Vol. 1, 428.

Nor does it lie when the suit claimed to have been malicious was founded on a just claim, though smaller than the sum claimed when the value of the property attached did not exceed the amount actually due. *Grant* v. *Moore*, 29 Cal. 644. See *Batchelder* v. *Frank*, 49 Vt. 90. *Ante*, Vol. 1, 426, 428.

An action for malicious prosecution will lie against persons who petition for an adjudication in bankruptcy without reasonable and probable cause, and knowingly and willfully, or recklessly, swear to depositions false in fact. *Farley* v. *Danks*, 4 Ell. & Bl. 499; *Brown* v. *Chapman*, 1 Wm. Bl. 427.

§ 4. **Want of probable cause.** In order to maintain an action for malicious prosecution it is indispensable that the plaintiff prove both the want of probable cause for the prosecution against him, and malice on the part of the defendant. If he fail to prove either of these facts, the action will necessarily fail. *Heyne* v. *Blair*, 62 N. Y. (17 Sick.) 19; *Besson* v. *Southard*, 10 N. Y. (6 Seld.) 236; *Foshay* v. *Ferguson*,

2 Denio, 617; *Cook* v. *Walker*, 30 Ga. 519; *Dickinson* v. *Maynard*, 20 La. Ann. 66; *Ganea* v. *Southern Pacific R. R. Co.*, 51 Cal. 140; *Glaze* v. *Whitley*, 5 Oregon, 164; *Willis* v. *Knox*, 5 S. C. 474; *Harkrader* v. *Moore*, 44 Cal. 144; *Deitz* v. *Langfitt*, 63 Penn. St. 234.

Proof of malice will not excuse or supply the want of proof of want of probable cause, neither can the want of probable cause be inferred from proof of malice, although malice may be inferred from the want of probable cause. *Heyne* v. *Blair*, 62 N. Y. (17 Sick.) 19; *Sutton* v. *Johnstone*, 1 Term R. 493, 544, 545; *Wheeler* v. *Nesbitt*, 24 How. (U. S.) 544; *Horn* v. *Boon*, 3 Strobh. 307; *Mitchinson* v. *Cross*, 58 Ill. 366.

Probable cause as defined in the books is such a state of facts and circumstances as would lead a man of ordinary caution and prudence, acting conscientiously, impartially, reasonably and without prejudice upon the facts within his knowledge, to believe that the person accused is guilty. *Heyne* v. *Blair*, 62 N. Y. (17 Sick.) 19; *Bacon* v. *Towe*, 4 Cush. 217; *Carl* v. *Ayres*, 53 N. Y. (8 Sick.) 14; *McGurn* v. *Brackett*, 33 Me. 331; *Ames* v. *Snider*, 69 Ill. 376; *Mowry* v. *Whipple*, 8 R. I. 360; *Shaul* v. *Brown*, 28 Iowa, 37; 4 Am. Rep. 151; *Landa* v. *Obert*, 45 Tex. 539; *Hays* v. *Blizzard*, 30 Ind. 457.

The question of the presence or absence of probable cause for a criminal prosecution does not depend upon the guilt or innocence of the accused, or upon the fact whether or not a crime has been committed. *Carl* v. *Ayres* 53 N. Y. (8 Sick.) 14; *Baldwin* v. *Weed*, 17 Wend. 224; *Bacon* v. *Towe*, 4 Cush. 218; *Thompson* v. *Lumley*, 50 How. 105; *Moore* v. *Sauborin*, 42 Mo. 490; *Gallaway* v. *Burr*, 32 Mich. 332.

A person making a criminal accusation may act upon appearances, and if the apparent facts are such that a discreet and prudent person would be led to the belief that a crime had been committed by the person charged, he will be justified, although it turns out that he was deceived and the party accused was innocent. But a groundless suspicion, unwarranted by the conduct of the accused, or by facts known to the accuser, when the accusation is made, will not exempt the latter from liability to an innocent person for damages for causing his arrest. A man has no right to put the criminal law in motion against another, and deprive him of his liberty upon a mere conjecture that he has been guilty of a crime. *Carl* v. *Ayres*, 53 N. Y. (8 Sick.) 14.

Belief in the guilt of the accused will not justify a criminal prosecution, unless there is reasonable or probable grounds for such belief. *Thompson* v. *Lumley*, 50 How. 105; *Farnam* v. *Feeley*, 56 N. Y. (11 Sick.) 451; 1 Am. Lead. Cases, 265; *Merriam* v. *Mitchell*, 13 Me.

439; *Hays* v. *Blizzard*, 30 Ind. 457; *Douglas* v. *Corbett*, 6 Ell. & Bl. 514; *Travis* v. *Smith*, 1 Penn. St. 234.

If there was probable cause for the prosecution, it is not material whether the prosecutor was actuated by a desire to subserve the interests of public justice, or whether he was actuated by improper motives (*Ames* v. *Snider*, 69 Ill. 376); neither is the motive material if the accused was, in fact, guilty of the offense charged (*Adams* v. *Lisher*, 3 Blackf. 241, 245; *Foshay* v. *Ferguson*, 2 Denio, 617); neither is it material that there was probable cause for the accusation, if the facts constituting the probable cause were unknown to the accuser at the time of making the charge. *Galloway* v. *Stewart*, 49 Ind. 156; S. C., 19 Am. Rep. 677; *Turner* v. *Ambler*, 10 Q. B. 252.

Civil liability is not probable cause for instituting a criminal proceeding. *Schmidt* v. *Weidman*, 63 Penn. St. 173.

The question of probable cause, where there is no conflict in the evidence, nor disputed facts, nor any doubt upon the evidence, or the inferences to be drawn from it, is one of law for the court, and not of fact for the jury. *Heyne* v. *Blair*, 62 N. Y. (17 Sick.) 22; *Cloon* v. *Gerry*, 13 Gray (Mass.), 201; *Taylor* v. *Godfrey*, 36 Me. 525; *Grant* v. *Moore*, 29 Cal. 644.

But, if the facts which are adduced as proof of want of probable cause are controverted, or if conflicting testimony is to be weighed, or if the credibility of witnesses is to be passed upon, the question of probable cause should go to the jury with proper instructions as to the law. In such cases it is a mixed question of law and fact. *Besson* v. *Southard*, 10 N. Y. (6 Seld.) 236; *Landa* v. *Obert*, 45 Tex. 539; *Cole* v. *Curtis*, 16 Minn. 182; *Driggs* v. *Burton*, 44 Vt. 124; *Weinberger* v. *Shelly*, 6 Watts & Serg. 336; *Travis* v. *Smith*, 1 Penn. St. 234; *Busst* v. *Gibbons*, 30 L J. Exch. 75; *Panton* v. *Williams*, 2 Q. B. 193; *Nash* v. *Orr*, 3 Brevard (S. C.), 94; *Greenwade* v. *Mills*, 31 Miss. 464.

Probable cause is clearly a question of law within the province of the court to decide; but the jury must not only find the facts which are supposed to constitute probable cause, but they are also warranted in forming their conclusions from those facts; and it consequently becomes difficult in this class of cases to draw the line between matters of law and matters of fact. *Davis* v. *Russell*, 5 Bing. 354; 2 M. & P. 604. There have been some cases in which the rule, that the court must determine from the facts found by the jury whether or not there is reasonable or probable cause, seems to have been overlooked. In some cases the reasonableness and probability of the ground for the prosecution has depended, not merely upon the proof of certain facts, but upon the

question whether other facts which furnished an answer to the prosecution were known to the prosecutor at the time it was instituted. In other cases, the question has turned upon the inquiry whether the facts stated to the prosecutor at the time, and which formed the ground of the prosecution, were believed by him or not. In other cases, the inquiry has been whether, from the conduct of the prosecutor himself, the jury will infer that he was conscious that he had no reasonable and probable cause. But, in these and many other cases which might be suggested, it is obvious that the knowledge and belief and the conduct of the prosecutor are so many additional facts for the consideration of the jury, so that, in effect, nothing is left for the jury but the truth of the facts proved, and the justice of the inference to be drawn from such facts, the court determining, as a matter of law, according as the jury find the facts proved or not proved, and the inferences warranted or not, whether there was reasonable and probable ground for the prosecution, or the reverse. TINDAL, C. J., in *Panton* v. *Williams*, 2 Q. B. 194. And see *Taylor* v. *Willans*, 2 Barn. & Ad. 856; *Broad* v. *Ham*, 5 Bing. N. C. 722; 8 Sc. 48; *Turner* v. *Ambler*, 10 Q. B. 252.

§ 5. **Of malice in the prosecution.** As has been before stated, where there was probable cause for the prosecution complained of as malicious, it is of no importance what were the motives of the prosecutor. But where there was no probable cause for such prosecution, the person aggrieved thereby has no right of action for the recovery of the resulting damages unless the prosecution was also malicious. In other words, to sustain the action there must be proof of both malice and want of probable cause. *Harpham* v. *Whitney*, 77 Ill. 32; *King* v. *Colvin*, 11 R. I. 582; *Wicker* v. *Hotchkiss*, 62 Ill. 107; S. C., 14 Am. Rep. 75; *Deitz* v. *Lanfitt*, 63 Penn. St. 234; *Cook* v. *Walker*, 30 Ga. 519; *Heyne* v. *Blair*, 62 N. Y. (17 Sick.) 19; *Dickinson* v. *Maynard*, 20 La. Ann. 66; And see *ante*.

The burden is on the plaintiff to prove both these facts. *Heyne* v. *Blair*, 62 N. Y. (17 Sick.) 19; *Levy* v. *Brannan*, 39 Cal. 485; *Israel* v. *Brooks*, 23 Ill. 575.

Whether malice is proved or not is a question of fact for the jury. *Newell* v. *Downs*, 8 Blackf. 523; *Von Latham* v. *Libby*, 38 Barb. 339; *Besson* v. *Southard*, 10 N. Y. (6 Seld.) 236; *Potter* v. *Seale*, 8 Cal. 217; *Ritchey* v. *Davis*, 11 Iowa, 124; *Cloon* v. *Gerry*, 13 Gray, 201; *Levy* v. *Brannan*, 39 Cal. 485.

It is not necessary, however, that express malice be shown. Malice in the prosecution may be inferred from want of probable cause. *Holliday* v. *Sterling*, 62 Mo. 321; *Newell* v. *Downs*, 8 Blackf. 523; *Calla-*

han v. *Caffarata*, 39 Mo. 136; *Harpham* v. *Whitney*, 77 Ill. 32; *Burst* v. *Gibbons*, 30 L. J. Exch. 75; *Mowry* v. *Whipple*, 8 R. I. 360; *Straus* v. *Young*, 36 Md. 246. But malice is not in any case a legal presumption from want of probable cause; it may, however, be found by the jury from the same facts as show want of probable cause. *Harkrader* v. *Moore*, 44 Cal. 114; *Oliver* v. *Pate*, 43 Ind. 132; *Harpham* v. *Whitney*, 77 Ill. 32; *Newell* v. *Downs*, 8 Blackf. 523; *Ammerman* v. *Crosby*, 26 Ind. 451; *Levi* v. *Brannan*, 39 Cal. 485; *Bell* v. *Pearcy*, 5 Ired. 83. If, however, the prosecution was wholly without cause, no further evidence of malice is necessary. *Hayes* v. *Hayman*, 20 La. Ann. 336; *Holburn* v. *Neal*, 4 Dana (Ky.), 120. Probable cause can never be inferred from the plainest malice. *Scott* v. *Shelor*, 28 Gratt. 891.

No general rule can be laid down by which the question of what constitutes malice in instituting a prosecution can be determined, and the question must be decided by the facts of each individual case. But the facts from which malice is found ought to be such as to satisfy any reasonable mind that the prosecutor had no ground for the proceeding but his desire to injure the accused. *Willans* v. *Taylor*, 6 Bing. 186; 2 B. & Ad. 845; *Farmer* v. *Darling*, 4 Burr. 1972. See *Pullen* v. *Glidden*, 66 Me. 202.

If a person prefers an indictment, or sets the criminal law in motion, knowing at the time he does so that he has no reasonable ground for it, that alone is evidence of malice on his part. *Stevens* v. *Midland Railway Co.*, 10 Exch. 356; 23 L. J. Exch. 328. Any prosecution carried on wantonly, and for no purposes of justice, is malicious. *Kerr* v. *Workman*, Addis. (Penn.) 270. By the term "malice" is meant any indirect motive of wrong. Any motive, other than that of simply instituting a prosecution for the purpose of bringing a person to justice, is a malicious motive on the part of the person who acts under the influence of it. If a case is trumped up out of very weak and flimsy materials for the purpose of annoyance or of frightening other people, and deterring them from committing depredations upon private property, there is no legitimate foundation for a criminal prosecution, and persons who put the criminal law in motion under such circumstances lay themselves open to a charge of being influenced by malice. *Stevens* v. *Midland Railway Co.*, 10 Exch. 356; 23 L. J. Exch. 328.

So, if a person puts the criminal law in motion for the purpose of enforcing payment of a debt, or obtaining the restitution of goods lawfully detained, without reasonable ground, there is evidence of malice in the prosecution. *Brooks* v. *Warwick*, 2 Stark. 393; *McDonald* v.

Rooke, 2 B. N. C. 219; *Schofield* v. *Ferrers*, 47 Penn. St. 194; *Kimball* v. *Bates*, 50 Me. 308. *Ante*, 337, § 1.

Malice may also be inferred from the zeal and activity of the prosecutor in conducting the prosecution. *Straus* v. *Young*, 36 Md. 246. But it cannot be inferred from the mere employment of counsel to conduct the prosecution. *Aldridge* v. *Churchill*, 28 Ind. 62.

So, the existence of malice in the prosecution may be inferred from the conduct and declarations of the prosecutor in regard to the accused, at or about the time of the prosecution. *Chapman* v. *Dodd*, 10 Minn. 350; *Michell* v. *Williams*, 11 M. & W. 217; *Turner* v. *Walker*, 3 Gill & J. 377. And see *Heslop* v. *Chapman*, 23 L. J. Q. B. 49; 2 C. L. R. 139.

But it must be remembered that these facts do not of themselves raise a legal presumption of malice; and that in actions for malicious prosecution there is no such thing as malice in law, and that its existence is purely a question of fact for the jury. *Ritchey* v. *Davis*, 11 Iowa, 124.

§ 6. **Termination of the prosecution.** It is well settled that a person cannot maintain an action for a malicious prosecution of a civil suit against him, until after the legal termination of that suit in his favor. *Wood* v. *Laycock*, 3 Metc. (Ky.) 192; *O'Brien* v. *Barry*, 106 Mass. 300; S. C., 8 Am. Rep. 329; *Grant* v. *Moore*, 29 Cal. 644. And it may be laid down as a general rule that no action for a malicious prosecution can be brought until the prosecution complained of is ended. *Gillespie* v. *Hudson*, 11 Kan. 163; *Hamilburgh* v. *Shepard*, 119 Mass. 30; *Gorrell* v. *Snow*, 31 Ind. 215; *Wheeler* v. *Nesbitt*, 24 How. (U. S.) 544; *Smith* v. *Shackleford*, 1 N. & M. (S. C.) 36; *O'Driscoll* v. *M'Burney*, 2 id. 54; *Thomas* v. *DeGraffenreid*, id. 143; *Hall* v. *Fisher*, 20 Barb. 441. And see *Searll* v. *McCracken*, 16 How. 262; *Thomason* v. *Demott*, 18 How. 529; S. C., 9 Abb. 242. As to what termination of the prosecution or action will authorize the commencement of an action for malicious prosecution is not so clear. When the suit complained of is a civil action, wholly under the control of the plaintiff therein, it would seem that a discharge thereof by him, without any judgment or verdict, is a sufficient termination of the suit; and that, for instance, if one maliciously causes another to be arrested and held to bail for a sum not due, or for more than is due, knowing that there is no probable cause, and, after entering his action, becomes nonsuit, or settles the case upon receiving a part of the sum demanded, an action for malicious prosecution may be maintained against him. *Cardival* v. *Smith*, 109 Mass. 158; S. C., 12 Am. Rep. 682; *Nicholson* v. *Coghill*, 4 B. & C. 21; S. C., 6 Dowl. & R. 12; *Watkins* v. *Lee*, 5 M.

& W. 270; *Ross* v. *Norman*, 5 Exch. 359; *Bicknell* v. *Dorion*, 16 Pick. 478, 487; *Savage* v. *Brewer*, id. 453.

When the prosecution alleged to have been malicious is by complaint in behalf of the people for a crime, and in pursuance thereof an indictment has been found and presented to a court having jurisdiction to try it, an acquittal by a jury must be shown; and a *nolle prosequi* entered by the attorney for the government has been held not sufficient; for the finding of the grand jury is some evidence of probable cause, and another indictment may still be found on the same complaint. *Cardival* v. *Smith*, 109 Mass. 158; S. C., 12 Am. Rep. 682; *Bacon* v. *Towne*, 4 Cush. 217; *Parker* v. *Farley*, 10 id. 279; *Bacon* v. *Waters*, 2 Allen, 400; Bul. N. P. 14; *Driggs* v. *Burton*, 44 Vt. 124; *Brown* v. *Lakeman*, 12 id. (Mass.) 482. But the contrary has also been held. *Moulton* v. *Beecher*, 1 Abb. N. C. 193; 52 How. 182; *Chapman* v. *Woods*, 6 Blackf. 504; *Yocum* v. *Polly*, 1 B. Monr. 358; *Richter* v. *Koster*, 45 Ind. 440; *Rice* v. *Ponder*, 7 Ired. 390; *Brown* v. *Randall*, 36 Conn. 56; 4 Am. Rep. 35.

If the prosecution is commenced by a complaint to a magistrate who has jurisdiction only to bind over or discharge, his record, stating that the complainant withdrew his prosecution and it was thereupon ordered that the accused be discharged, is equivalent to an acquittal. *Sayles* v. *Briggs*, 4 Metc. 421, 426; *Cardival* v. *Smith*, 109 Mass. 158; S. C., 12 Am. Rep. 682; *Brown* v. *Randall*, 36 Conn. 56; S. C., 4 Am. Rep. 35; *Driggs* v. *Burton*, 44 Vt. 124. So, a discharge of the accused by the magistrate is a sufficient termination of the suit. *Secor* v. *Babcock*, 2 Johns. 203. So, if the accused, after being arrested, is discharged by the failure of the grand jury to find an indictment, that shows a legal end to the prosecution. *Jones* v. *Givin*, Gilb. 185, 220; *Morgan* v. *Hughes*, 2 T. R. 225, 232; *Freeman* v. *Arkell*, 2 B. & C. 494; S. C., 3 D. & R. 669; *Mitchell* v. *Williams*, 11 M. & W. 205; *Bacon* v. *Waters*, 2 Allen, 400; *Cardival* v. *Smith*, 109 Mass. 158; S. C., 12 Am. Rep. 682.

And if the accused, after being held to bail for his appearance at the next term of court, is discharged by the prosecuting attorney without action by the grand jury, the action will lie. *Schoonover* v. *Myers*, 28 Ill. 308. So it has been held that the dismissal or abandonment of a criminal prosecution before trial is a sufficient termination of the prosecution for the purpose of maintaining an action for a malicious prosecution, and that a verdict and judgment on the merits is not essential. *Kelley* v. *Sage*, 12 Kans. 109; *Mc Williams* v. *Hoban*, 42 Md. 56; *Gilbert* v. *Emmons*, 42 Ill. 143; *Fay* v. *O'Neill*, 36 N. Y. (9 Tiff.) 11; *Leever* v. *Hamill*, 57 Ind. 423.

Striking a cause from the docket on motion of the State's attorney, with leave to reinstate the same, is not a legal termination of the prosecution within the meaning of the rule. *Blalock* v. *Randall*, 76 Ill. 224. But if the indictment is quashed and the defendant discharged by the judgment of the court, there is a sufficient termination of the prosecution to maintain an action for malicious prosecution. *Hays* v. *Blizzard*, 30 Ind. 457.

If the prosecution terminated in a conviction, the action clearly will not lie. *Miller* v. *Deere*, 2 Abb. 1; *Monroe* v. *Maples*, 1 Root, 554; *Cloon* v. *Gerry*, 13 Gray, 201; *Hibbing* v. *Hyde*, 50 Cal. 206; *Griffis* v. *Sellars*, 2 Dev. & Bat. 492. See *Palmer* v. *Avery*, 41 Barb. 290. But, where such conviction was procured by the fraud or perjury of the defendant, the rule is otherwise. Id.; *Witham* v. *Gowen*, 14 Me. 362; *Payson* v. *Caswell*, 22 id. 226; *Burt* v. *Place*, 4 Wend. 591.

If a person is arrested, brought before a justice and committed in default of bail for his appearance at the next term of court, and in the meantime procures his discharge on a writ of *habeas corpus*, this will not be such a termination of the prosecution as will support this action. *Walker* v. *Martin*, 43 Ill. 508; *Swartwout* v. *Dickelman*, 12 Hun (N. Y.), 358.

§ 7. **Who may sue.** An action for malicious prosecution is, in general, brought by the person who has suffered damage by the wrong. It will lie by a master for the malicious prosecution of a slave. *Locke* v. *Gibbs*, 4 Ired. (N. C.) 42.

And where the statute of a State permits an assignee of a right of action to sue in his own name, or allows a right of this nature to descend to a personal representative on the death of the party injured, the action may be maintained by such assignee or personal representative.

§ 8. **Who may be sued.** It was formerly an unsettled question in England whether an action for malicious prosecution would lie against a corporation aggregate. *Stevens* v. *Midland Counties Railway Co.*, 10 Exch. 356; 26 Eng. Law & Eq. 410.

In the United States, the right to maintain an action of this nature against a corporation is not settled. In some of the States it has been held that an action will lie against a corporation aggregate, without showing express authority from the corporation to its agents to institute the prosecution, provided they acted within the scope of their general authority. *Fenton* v. *Willson Sewing Machine Co.*, 9 Phil. (Penn.) 189. A private corporation is liable in an action for a ma-

licious prosecution. *Copley* v. *Grover & Baker Sewing Machine Co.*, 2 Woods (C. C.), 494.

On the other hand, it has been held that an action of this nature will not lie against a railroad corporation for a malicious prosecution instituted by one of it officers against an employee for an alleged embezzlement of its funds, on the ground that the prosecution was *ultra vires*. *Gillett* v. *Missouri Valley R. R. Co.*, 55 Mo. 315; S. C., 17 Am. Rep. 653.

To render a person liable to an action for malicious prosecution it is not necessary that he should be the originator of the prosecution. It is sufficient to fix his liability that he participated voluntarily in the prosecution, and that it was carried on with his countenance and approbation. *Stansbury* v. *Fogle*, 37 Md. 369.

His responsibility commences at the point at which he becomes cognizant of the proceedings continued by him. But there is a material distinction between instituting a prosecution and merely attending the hearing of a proceeding already commenced, as has been before stated. It does not follow that, because a person attends the hearing, he adopts the proceeding or renders himself responsible for the motive or actions of the person who instituted it, although that person may be his agent. *Weston* v. *Beeman*, 27 L. J. Exch. 57.

A person who maliciously makes an affidavit for the procurement of an attachment becomes liable for the resulting injury without further intervention on his part. *Walser* v. *Thies*, 56 Mo. 89. *Ante*, Vol. 1, 428.

If a person gives another general authority to use his name as he sees fit in prosecuting suits, without informing himself of the facts and circumstances, and shares the compensation, he may be properly joined as a defendant with the person using his name in the prosecution of a malicious suit, and cannot shield himself by a plea of ignorance. *Kinsey* v. *Wallace*, 36 Cal. 462.

An agent or attorney who maliciously and illegally sues out process is liable in an action for malicious prosecution and is a proper defendant. *Warfield* v. *Campbell*, 35 Ala. 349; *Wood* v. *Weir*, 5 B. Monr. 544.

But an action for malicious prosecution cannot be maintained against an attorney at law for bringing a civil action, unless he commenced it without authority, or unless there was a conspiracy between him and his client to bring a groundless suit, knowing it to be such and without intent or expectation of maintaining it. *Bicknell* v. *Dorion*, 16 Pick. 478.

The action cannot be maintained against a grand juror for informa-

tion given to fellow jurors on which an indictment is found. *Black* v. *Sugg*, Hardin (Ky.), 566.

§ 9. **Damages.** The damages recoverable in a action for malicious prosecution will depend on the nature of the prosecution alleged to have been malicious and the nature of the proceedings had therein.

The principle of awarding damages seems to be the same whether the prosecution is by indictment or by civil proceedings, and if the prosecution in either case is malicious and without probable cause, the jury, in estimating the damages, are not confined to the actual damages proved, but they may, in the exercise of a sound discretion, give exemplary damages; and, although the party may not recover taxable costs, if he has judgment for the same, yet he may recover counsel fees and other expenses incident to the defense of the suit. *Lawrence* v. *Hagerman*, 56 Ill. 68; S. C., 8 Am. Rep. 674.

In England, before the statute of Marlbridge, no costs were recoverable in civil actions, but if such action had been brought maliciously and without probable cause, and had terminated in favor of the defendant, the defendant had his remedy by action against the plaintiff. Since this statute, however, by which costs are given to the defendant in all actions in case of a nonsuit or verdict against the plaintiff, it seems that no action can be maintained merely in respect of a suit maliciously instituted, except in some cases under legislative provisions, and except, perhaps, in those cases when the defendant failed to obtain the ordinary costs, owing to the insolvency of a third party in whose name the suit was prosecuted, the costs awarded by the statute being in lieu of damages. *Closson* v. *Staples*, 42 Vt. 209; S. C., 1 Am. Rep. 316.

In this country it has been well said that the statutes under which the prevailing party recovered certain costs in the prosecution or defense of a civil action stand upon the ground that a party has a right *in good faith* to bring and prosecute a civil action to obtain an adjudication upon certain claims or rights in issue therein, and that a reasonable administration of justice demands that the costs and expenses of litigating those claims or rights, over and above certain items of costs, which the statute allows the prevailing party to recover, should be borne by the respective parties by whom the expenses are incurred, without regard to the result of the action: but as the system of taxing costs under these statutes, except in a very few cases, was created with reference to suits brought and prosecuted in good faith, it furnishes no criterion by which to estimate the damages which the defendant recovers to recompense him for the costs and expenses incurred in defending an action brought against him maliciously and

without reasonable or probable cause by a person having no claim in respect to which he had a right to invoke the aid of the law; and that in such cases the defendant may recover of the plaintiff, in an action on the case, the damages sustained by him in the defense of the original suit over and above the taxable costs obtained by him therein. *Closson* v. *Staples*, 42 Vt. 209; S. C., 1 Am. Rep. 316.

The plaintiff in the action for malicious prosecution is not, however, limited in his recovery to the amount of his costs and disbursements in excess of the costs recovered by him in the original action. If the malicious prosecution was founded upon a criminal charge, in which the defendant was arrested, he has a right to indemnity for all the injury to reputation, feelings, health, mind and person, caused by the arrest, including the expenses of his defense. *Fagnan* v. *Knox*, 8 Jones & S. (N. Y.) 41; S. C., reversed on other points, 66 N. Y. (21 Sick.) 525; *Sheldon* v. *Carpenter*, 4 N. Y. (4 Comst.) 579.

The jury may take into consideration all the circumstances of the case, and award such damages as will not only be a compensation for the wrong and indignity sustained in consequence of the wrongful act, but may also award exemplary or punitive damages as a punishment for such act. *Mc Williams* v. *Hoban*, 42 Md. 56; *Stewart* v. *Cole*, 46 Ala. 646. A verdict for $1,700 damages for malicious arrest and prosecution has been held not excessive in the absence of proof of justification. *Reno* v. *Wilson*, 49 Ill. 95.

The jury are the proper judges of the amount of damages to be allowed in actions of this nature, and unless there is something in the case showing that in their determination they were influenced by passion, prejudice or some improper motive, their verdict will not be disturbed. *Chapman* v. *Dodd*, 10 Minn. 350. But parties who, in good faith, and upon grounds believed at the time to be sufficient, cause the arrest of supposed offenders, should not be mulcted in damages merely because the accused party has succeeded in obtaining an acquittal. *Ganea* v. *Southern Pacif. R. R. Co.*, 51 Cal. 140. It is held that the damages assessed may include a reasonable attorney's fee, for which the plaintiff became liable in defending himself in the criminal prosecution against him, though he has not yet paid the fee. *Ziegler* v. *Powell*, 54 Ind. 173.

ARTICLE II.

OF THE DEFENSES TO THE ACTION.

Section 1. Probable cause. It is a good defense to an action for malicious prosecution that there was probable cause, or if not, that the

defendant was not actuated by what the law terms malice. *Ewing* v. *Sanford*, 21 Ala. 157; *Calef* v. *Thomas*, 81 Ill. 478.

As has been before stated, the question of probable cause does not depend upon whether the offense has been committed in fact, nor whether the accused is guilty or innocent, but upon the prosecutor's belief based upon reasonable grounds. The prosecutor may act upon appearances, and if the apparent facts are such that a discreet and prudent person would be led to the belief that the accused had committed a crime, he will not be liable in this action, although it may turn out that the accused was innocent. *Carl* v. *Ayers*, 53 N. Y. (8 Sick.) 14. *Farnam* v. *Feeley*, 56 N. Y. (11 Sick.) 451; *Fagnan* v. *Knox*, 66 N. Y. (21 Sick.) 525. And see *ante*, p. 342.

If there be an honest belief of guilt, and there exist reasonable grounds for such belief, the party will be justified. But however suspicious the circumstances may be, if the prosecutor has knowledge of the facts which will explain the suspicious appearances and exonerate the accused of a criminal charge, he cannot justify a prosecution by putting forth the *prima facie* circumstances, and excluding those within his knowledge which tend to prove innocence. *Fagnan* v. *Knox*, 66 N. Y. (21 Sick.) 525.

Belief in the guilt of the accused is no justification, standing alone. There must also be reasonable or probable grounds for the belief. *Thompson* v. *Lumley*, 50 How. 105; *Graeter* v. *Williams*, 55 Ind. 461. *Ante*, p. 342.

And, if there was probable cause for the prosecution, the justification is complete, whether the prosecutor was actuated by proper motives, or otherwise. *Ames* v. *Snider*, 69 Ill. 376. *Ante*, p. 342.

But it will be no justification that there was, in fact, probable cause for the prosecution, if the party did not know the facts of constituting the probable cause when the prosecution was commenced. *Galloway* v. *Stewart*, 49 Ind. 156; 19 Am. Rep. 677.

Mere conversion of property is not larceny, and information of such conversion constitutes no grounds of probable cause as a defense to the action for malicious prosecution. *Turner* v. *O'Brien*, 5 Nebr. 542.

§ 2. **Want of malice.** As has already been shown, an action for malicious prosecution cannot be maintained without proof that the prosecution was malicious and without probable cause. Therefore, when a *prima facie* case has been made by the plaintiff, all that is necessary on the part of the defendant to defeat the action is, to prove either the existence of probable cause, or the absence of malice in the prosecution. If probable cause is shown, the absence of malice in instigating the prosecution need not be shown as a defense, as the motive in instigat-

ing the prosecution ceases to be material; but, where the defendant fails to show facts which the law will recognize as constituting probable cause, proof of the absence of malice may become indispensable.

From the same facts which show the absence of probable cause, the jury may infer legal malice, and hence the proof of good faith in instituting the prosecution should be as full and positive as the circumstances will warrant.

If the defendant in the action for malicious prosecution was not the prosecutor, in fact, and is sought to be made so by construction for having given false information, which led to a subsequent arrest, the motive is material, and proof that the information was given in good faith is a defense to the action. *Farnam* v. *Feeley*, 56 N. Y. (11 Sick.) 451.

And, in any case, although the defendant is unable to justify by proof of probable cause, he may still rebut the presumption of malice by showing facts and circumstances calculated to produce at the time on the mind of a reasonable and prudent man a well grounded belief or suspicion of the guilt of the person accused. *Harpham* v. *Whitney*, 77 Ill. 32.

§ 3. **Advice of counsel.** The defendant may also rebut the presumption of malice by showing that he acted under the advise of counsel. If the defendant communicated to counsel all the facts bearing upon the guilt or innocence of the accused of which he had knowledge, or could by reasonable diligence have ascertained, and, acting under the advice of such counsel, procures the accused to be indicted, he may plead the advice thus given as a defense in an action for malicious prosecution. *Wicker* v. *Hotchkiss*, 62 Ill. 107; 14 Am. Rep. 75; *Calef* v. *Thomas*, 81 id. 478; *Burris* v. *North*, 64 Mo. 426; *Ames* v. *Rathbun*, 55 Barb. 194; *Center* v. *Spring*, 2 Clarke (Iowa), 393; *Fisher* v. *Forrester*, 33 Penn. St. 501; *Potter* v. *Seale*, 8 Cal. 217.

The fact that the defendant sought, received and acted upon the advice of counsel affords strong evidence that there was probable cause and that the prosecution was entered into in good faith and without malice. *Skidmore* v. *Bricker*, 77 Ill. 164; *Murphy* v. *Larson*, 77 id. 172.

While an honest reliance on the advice of counsel, who has been fully informed of the facts, may be a complete justification in an action for malicious prosecution, the advice of a lawyer who is a pettifogger will be no justification. *Stanton* v. *Hart*, 27 Mich. 539. And a reliance upon the advice of a person who is not a counselor or attorney at law is incompetent to disprove malice. *Olmstead* v. *Partridge*, 82 Mass. 381; *Straus* v. *Young*, 36 Md. 246.

And in order to make the advice of counsel available as a defense, the defendant must show that he communicated to him all the facts which he knew, or by reasonable diligence could have known, bearing upon the guilt or innocence of the accused, even though the defendant supposed that some of the facts were not material. *Hill* v. *Palm*, 38 Mo. 13; *Sharpe* v. *Johnston*, 59 Mo. 557; *Thompson* v. *Lumley*, 50 How. 105; *Sappington* v. *Watson*, 50 Mo. 83; *Cooper* v. *Utterbach*, 37 Md. 282; *Ross* v. *Innis*, 26 Ill. 259.

The defendant must also show good faith in acting under the advice of counsel. If, after making a full and fair statement of the case to counsel and receiving advice thereon, other facts come to the knowledge of the defendant which satisfy him that the accused is not guilty, the fact that he received and acted upon the advice is no protection. *Cole* v. *Curtis*, 16 Minn. 182.

The defendant must also show good faith in the selection of counsel, and the counsel selected must be a regularly licensed attorney and counselor, reputable in character, and considered in the community competent to give legal advice on all matters pertaining to the law. *Murphy* v. *Larson*, 77 Ill. 172.

In some of the States the effect of the advice of counsel as a defense in an action for malicious prosecution is regulated and defined by statute.

Under the Georgia Code the advice of counsel is not in itself a protection to the defendant in this action; yet, evidence of the fact may be submitted to the jury as a circumstance tending to show a want of malice, the existence of probable cause, and in mitigation of damages. *Fox* v. *Davis*, 55 Ga. 298. And see *Raver* v. *Webster*, 3 Clarke (Iowa), 502.

If the evidence shows that the defendant acted from motives of private interest and without probable cause, the advice of counsel will not exempt him from liability. *Glascock* v. *Bridges*, 15 La. Ann. 672.

Advice of counsel is merely evidence to rebut the imputation of malice, and where that is expressly proved, advice of counsel does not palliate the wrong. *Davenport* v. *Lynch*, 6 Jones' Law (N. C.), 545.

Whether the advice of *private* counsel (instead of the district attorney), though given in good faith, with a full knowledge of the facts, is a complete defense to an action for a malicious prosecution, has been questioned in Wisconsin. *Plath* v. *Braunsdorff*, 40 Wis. 107. See *Dennis* v. *Ryan*, 65 N. Y. (20 Sick.) 385; S. C., 22 Am. Rep. 635.

§ 4. **Former suit not terminated.** An action for malicious prosecution will not lie where the prosecution alleged to be malicious is still

pending and undetermined, for the reason that until the termination of the prior suit it cannot appear that it was prosecuted maliciously and without probable cause. *O'Brien* v. *Barry*, 106 Mass. 300; 8 Am. Rep. 329; *Cardival* v. *Smith*, 109 Mass. 158; S. C., 12 Am. Rep. 682. See *ante*, p. 338.

It necessarily follows, then, that proof that the prior action is still pending and undetermined will be a good defense to an action for malicious prosecution. *Ante*, 347.

If the alleged malicious prosecution was founded on a criminal charge, it will be a good defense to show that it resulted in a conviction. *Miller* v. *Deere*, 2 Abb. 1; *Cloon* v. *Gerry*, 13 Gray, 201. But this is not always the case. See *ante*, 349. If the prosecution was by civil action, it will be a good defense to show that it resulted in a judgment in favor of the plaintiff therein, even if such judgment has been reversed upon appeal. *Palmer* v. *Avery*, 41 Barb. 290.

The question as to what constitutes a legal termination of the prosecution has been discussed in the preceding article.

Where a person has been committed to jail by a magistrate to await the action of the grand jury, and before the grand jury meet, has been discharged under a writ of *habeas corpus*, the discharge under the writ is not such a termination of the prosecution as will authorize the commencement of an action for malicious prosecution. The prosecution in such case is not determined until the grand jury meet and the case is presented and ignored, or the plaintiff fails to prosecute the action. *Swartwout* v. *Dickelman*, 12 Hun, 358; *Clark* v. *Cleveland*, 6 Hill, 344.

§ 5. **Want of jurisdiction.** Whether it is a good defense to the action for malicious prosecution that the prosecution complained of was had before a court having no jurisdiction, see *Painter* v. *Ives*, 4 Nebr. 122; *Bodwell* v. *Osgood*, 3 Pick. 379, 383; *Turpin* v. *Remy*, 3 Blackf. 210; *Morris* v. *Scott*, 21 Wend. 281; *Sweet* v. *Negus*, 30 Mich. 406; *Stone* v. *Stevens*, 12 Conn. 219; *Hays* v. *Younglove*, 7 B. Monr. 545.

CHAPTER XCII.

MANDAMUS.

TITLE I.

OF MANDAMUS IN GENERAL.

ARTICLE I.

REMEDY, WHEN GRANTED.

Section 1. Definition and nature. Mandamus may be defined as a writ issued by a competent court to an inferior one, or to a person, officer or corporation, commanding, in the name of the supreme authority of the State, the performance of some duty in the performance of which the public or some person is interested.

Originally, it was a common-law prerogative writ and issued only from the king's bench, where the sovereign was considered to be personally present, and to prevent a failure of justice, and where there was no other adequate legal remedy to enforce the performance of a duty in which the complaining party was interested. *Rex* v. *Barker*, 3 Burr. 1265; *King* v. *University*, 1 W. Black. 552; *Rex* v. *Windham*, 1 Cowp. 377; *Rex* v. *Severn, etc., Railway Co.*, 2 B. & Ald. 646; 3 Bl. Com. 110; *Dunklin County* v. *District County Court*, 23 Mo. 449.

Although it still retains in England and even in this country some of the characteristic features of the original prerogative writ, the proceeding now to secure the benefits of it is generally by an ordinary action. *People* v. *Board of Met. Police*, 26 N. Y. (12 Smith) 316; *People* v. *Hatch*, 33 Ill. 134; *City of Ottawa* v. *People*, 48 id. 240; *Commonwealth* v. *Dennison*, 24 How. 66; *Kendall* v. *United States*, 12 Pet. 527; *State* v. *Gracey*, 11 Nev. 223; *Gilman* v. *Bassett*, 33 Conn. 298; *Chamberlain* v. *Warburton*, 1 Utah, 267. But it is only issued, as originally, to prevent a failure of justice, and where there is no other clear and adequate remedy to enforce the performance of the duty. *Arrington* v. *Van Houton*, 44 Ala. 284; *State* v. *Guerrero*, 12 Nev. 105; *Reading* v. *Commissioners*, 11 Penn. St. 196; *Commonwealth* v. *Commissioners, etc.*, 16 S. & R. 317; *Fitch* v. *McDiarmid*, 26 Ark. 482; *State* v.

McCrillus, 4 Ark. 250; *Runion* v. *Latimer*, 6 So. Car. 126. As at common law, its original advantages as a remedy still continue, and it always issues as a command of the sovereign authority. Id. See, also, *Arberry* v. *Beavers*, 6 Tex. 457; *Gilman* v. *Bassett*, 33 Conn. 298; *Kendall* v. *United States*, 12 Pet. 527. Any court on which common law jurisdiction has been conferred is authorized to issue the writ. *Chumasero* v. *Potts*, 2 Mont. 242. As a preventive remedy simply, it is never used. *Legg* v. *Mayor of Annapolis*, 42 Md. 203. When the right and interest is one of public concern only, and one individual has no more right to have the act done than another, the application must be made by the attorney-general or other public prosecutor, as relator, whose duty it is to see to the enforcement of public rights and the performance of public duties on the part of public officers and agents of the government. *Bates* v. *Plymouth*, 14 Gray, 163; *Sanger* v. *County Commissioners*, 25 Me. 291; *Hamilton* v. *State*, 3 Ind. 458; *People* v. *Inspectors of State Prison*, 4 Mich. 187; *County of Pike* v. *State*, 11 Ill. 202; *Rex* v. *Merchant Tailors Co.*, 2 B. & Ald. 115; *People* v. *Green*, 29 Mich. 121; *People* v. *Hoyt*, 66 N. Y. (21 Sick.) 606.

In order to entitle an individual to this remedy, to compel a public officer or boards to perform a legal duty, it must appear that he has a direct interest in the performance of the duty, and will be directly injured by its non-performance. *People* v. *Regents of the University*, 4 Mich. 98; *Bates* v. *Plymouth*, 14 Gray, 163; *Heffner* v. *Commonwealth*, 28 Penn. St. 108; *Commonwealth* v. *Mitchell*, 82 id. 343.

But it seems that private persons, having an interest in the performance of a certain duty by a public officer, may, when the duty is not due to the government as such, apply for a mandamus in their own names, without the intervention of the government law officer. *Union Pacific R. Co.* v. *Hall*, 91 U. S. 343; *Hall* v. *Union Pacific R. R. Co.*, 3 Dill. (C. C.) 515. Thus it has been held that the validity of an election is a matter of such public right, that any citizen may be a relator in an application therefor. *State* v. *County Judge*, 7 Iowa, 186; *State* v. *Bailey*, id. 390. But this rule is predicated upon the fact that the particular officers, whose election was in question, were charged with duties that peculiarly related to the rights of citizens. Some interest in the relators, in the result, must exist, but a legal interest need not be shown. *Village of Glencoe* v. *People*, 78 Ill. 382.

The practice relating to this proceeding is in a measure regulated by statutes in the several States, and the practitioner will be obliged to consult the statute in the particular State, as it is not intended to treat of special statutory remedies in this work, but merely to give the proceedings at common law, which are in force unless wholly superseded

by statute, the writ only issues from a superior to an inferior tribunal, and the usual practice is to present a petition setting forth the specific relief demanded, the right of the relator thereto, and the duty of the defendant to do the act sought to be enforced, verified by affidavit of the relator. Upon this petition, a rule is generally issued to the defendant to show cause why a mandamus should not be granted, although in certain cases, when the right is clear, an alternative mandamus should be applied for, or will issue in the first instance. The test by which to determine whether an alternative mandamus may be applied for in the first instance is whether the facts are in dispute. If not, an alternative writ may be applied for in the first instance. If they are, a rule to show cause will issue. *Lutterloh* v. *Cumberland County*, 65 N. C. 403. There are, as we have noticed, two classes of writs, alternative and peremptory. The alternative writ is one which commands the party to do the act required, or show to the courts a reasonable excuse for not doing it. And the result of a rule to show cause, or an alternative mandamus, are about the same, as in either case, if the relator shows a legal right to have the act done, and the defendant does not show a valid excuse for not doing it, a peremptory writ will issue directing the defendant to do the act in question, and to which the defendant can only return a certificate of compliance, or that the writ improvidently issued (*State* v. *County Judge*, 12 Iowa, 237; *Weber* v. *Zimmermann*, 23 Md. 45), or that it commands the doing of an illegal act (*Everitt* v. *The People*, 1 Caines [N. Y.], 8), or one that is impossible. *Regina* v. *Ambergate*, 1 El. & Bl. 381; *Regina* v. *London, etc., R. R. Co.*, 16 Add. & El. (N. S.) 884.

In such cases, the remedy is by motion to quash the writ or vacate the rule granting the motion, and to set aside the writ. *Everitt* v. *People*, 1 Caines (N. Y.), 8. It may be observed that if a specific remedy is provided by statute, such remedy is usually exclusive of mandamus. *Ottawa* v. *People*, 48 Ill. 233.

A writ of alternative mandamus serves the purpose of a declaration or complaint in an ordinary action, and the defendant must answer it and respond to and meet all the allegations therein (*Gorgas* v. *Blackburn*, 14 Ohio, 252), and set forth facts sufficient to excuse performance of the act by him, or a peremptory mandamus will issue. *Society, etc.*, v. *Com.*, 52 Penn. St. 125; *State* v. *Avery*, 14 Wis. 122; *People* v. *White*, 11 Abb. Pr. (N. Y.) 168. See, also, as to when the allegations in the writ will be taken as true, *State* v. *Cincinnati*, 18 Ohio St. 262; *People* v. *Burrows*, 27 Barb. 89.

§ 2. **Who may apply for.** In order to entitle a party to the benefit of the writ it must, as we have seen, clearly appear by a motion based upon an affidavit, or by a duly verified petition, complaint or other pleading, that the defendant refuses to perform a duty, in the performance of which the plaintiff, complainant or relator, is interested, and by the non-performance of which he would be injured. *People* v. *Thompson*, 25 Barb. 73; *People* v. *Head*, 25 Ill. 325; *People* v. *Hilliard*, 29 id. 418; *People* v. *Supervisors*, 64 N. Y. (19 Sick.) 600; *People* v. *Collins*, 19 Wend. 65; *Silverthorne* v. *Warren R. R. Co.*, 33 N. J. 372; *Linden* v. *Case*, 46 Cal. 171; *People* v. *Green*, 29 Mich. 121. See, also, *People* v. *Green*, 58 N. Y. 295. It should also appear to the court to which the application is made that there is no other adequate remedy (*King* v. *Water Works Co.*, 6 Ad. & El. 355; *People* v. *Supervisors, etc.*, 12 Barb. 27; *Tarver* v. *Commissioners' Court*, 17 Ala. 527), that the applicant has a clear right to have the act done (*Fitch* v. *McDiarmid*, 26 Ark. 482; *Arrington* v. *Van Houton*, 44 Ala. 284; *Reading* v. *Commonwealth*, 11 Penn. St. 196; *Com.* v. *Pittsburgh*, 34 id. 496; *Draper* v. *Noteware*, 7 Cal. 276; *Napier* v. *Poe*, 12 Ga. 170), and that it is the duty of the defendant to do it. *People ex rel. Stevens* v. *Hayt*, 66 N. Y. (21 Sick.) 606; *People* v; *Board of Police*, 35 Barb. 535; *McDougall* v. *Bell*, 4 Cal. 177. *State* v. *Warren, etc., Co.*, 32 N. J. Law, 439. A private person may justly claim the benefit of the writ in all cases where the duty is not due to the government as such exclusively, without the intervention of the government officer or prosecutor. *Union Pacific R. Co.* v. *Hall*, 91 U. S. 343; *Hall* v. *Union Pacific R. Co.*, 3 Dill. (C. C.) 515; *State* v. *County Judge*, 7 Iowa, 186; *State* v. *Bailey*, id. 390; *Farrell* v. *King*, 41 Conn. 448.

§ 3. **When granted.** It is evident that the writ should be granted by the court whenever there is a concurrence of the facts heretofore stated. Thus a mandamus will be granted where there is no other clear legal mode of securing the rights which the complainant seeks, or other adequate remedy. *Commonwealth* v. *Pittsburgh*, 34 Penn. St. 496; *Peck* v. *Booth*, 42 Conn. 270. But it is never granted, as we shall hereafter more fully notice, where there is a discretion, in the person or officer, to control the free exercise of such discretion. *State* v. *Van Ness*, 15 Fla. 317; *Ex parte Harris*, 52 Ala. 87.

§ 4. **Officers of superior courts.** It is evident on general principles that the officers of superior courts may be compelled by mandamus to perform their duty where the rights of parties are or may be prejudiced by the refusal. Their duties are usually, if not always, ministerial in their nature, and the courts will always lend their aid by

way of mandamus in such cases, if there is no other plain, speedy and adequate remedy.

Thus, the better doctrine would seem to be that although a judgment creditor might apply to the court for an order against its clerk to issue an execution on a judgment duly entered, or sue the clerk and his sureties on his official bond, for a refusal so to do, still on the refusal of the court to act in the premises, or in case the remedy by other means would be imperfect or inadequate, the judgment creditor should have his remedy by mandamus. *Goodwin* v. *Glazier*, 10 Cal. 333; *Fulton* v. *Hanna*, 40 id. 278. See, also, *People* v. *Loucks*, 28 id. 68; *Attorney-General* v. *Lum*, 2 Wis. 507.

§ 5. **Inferior courts and officers.** Mandamus is frequently an appropriate remedy against inferior courts, judges and officers, to compel the performance of duties. Thus the supreme court of the United States may issue a mandamus to the circuit court, commanding it to sign a bill of exceptions (*Ex parte Crane*, 5 Pet. 189); to make up a record and render judgment thereon so that a writ of error may be brought. *Ex parte Bradstreet*, 7 id. 634.

And in all cases where the judges of an inferior court improperly neglect or refuse to perform a plain ministerial duty, and there is no other adequate remedy, a mandamus will issue from a superior court to compel it. Thus, it will issue to compel them to hear a motion for an attachment for a contempt, in disregarding an injunction, but not to control their discretion (*Merced Mining Co.* v. *Fremont*, 7 Cal. 130); to reinstate an action improperly abated (*Matter of Nabor*, 7 Ala. 459); to compel an inferior court to proceed to the trial of a cause which has been improperly continued (*Dixon* v. *Feild*, 10 Ark. 243); to compel the setting aside of a judgment improperly rendered, by default (*People* v. *Bacon*, 18 Mich. 247); to reinstate an attorney disbarred by a court for a cause over which it had no jurisdiction (*State* v. *Kirke*, 12 Fla. 278; *Ex parte Bradley*, 7 Wall. 364; *Withers* v. *State*, 36 Ala. 252; *People* v. *Justices*, 1 Johns. Cas. 181); to compel the removal of a cause into the United States courts, where the facts require it (*Hopper* v. *Kalkman*, 17 Cal. 517); to compel a judge to order a change of venue in a proper case (*State* v. *McArthur*, 13 Wis. 407; *Ex parte Chase*, 43 Ala. 303); to compel a clerk to deliver a transcript on a writ of error where he illegally refuses so to do (*Davis* v. *Carter*, 18 Tex. 400); to compel a referee to settle exceptions (*People* v. *Baker*, 35 Barb. 105); to compel a court to restore a cause improperly stricken from the docket (*Ex parte Lowe*, 20 Ala. 330); to compel the signing of bills of exceptions (*People* v. *Judges*, 1 Caines [N. Y.], 511; *State* v. *Hall*, 3 Coldw. [Tenn.] 255; *Porter* v. *Harris*, 4 Call. [Va.] 485;

Douglass v. *Loomis*, 5 W. Va. 542); to compel a court to proceed to hear a case when it has improperly refused to do so (*Castello* v. *Circuit Court*, 28 Mo. 259); to compel the entry of a judgment by confession (1 id. 116); to compel the entry of a judgment on a referee's report (*Russell* v. *Elliott*, 2 Cal. 245); or upon a verdict (*Ex parte Cox*, 10 Mo. 742); to compel the issue of process to which a party is clearly entitled (*Stafford* v. *Union Bank*, 17 How. [U. S.] 275); to compel an inferior court to re-hear a cause sent back for that purpose from an appellate court (*Cowan* v. *Doddridge*, 22 Gratt. [Va.] 458); to receive a verdict improperly refused (*State* v. *Knight*, 46 Mo. 83; *Munkers* v. *Watson*, 9 Kan. 668); to recognize a duly admitted attorney (1 Col. T. 352); to compel the setting aside of a writ of prohibition unlawfully granted (*Ex parte Keeling*, 50 Ala. 474); and generally to compel the performance of any merely ministerial or other plain duty of the inferior court or its officer (*United States* v. *Peters*, 5 Cranch, 115; *Insurance Co.* v. *Wilson*, 8 Pet. [U. S.] 291; *Ex parte Milwaukee R. Co.*, 5 Wall. [U. S.] 825); when the party has no adequate remedy by appeal or otherwise, and the court or officer is vested with no discretion, or there is a manifest abuse of discretion. *Manor* v. *McCall*, 5 Ga. 522; *Ex parte Harris*, 52 Ala. 87; *State* v. *Police Jury*, 29 La. Ann. 146; *Clark* v. *Minnis*, 50 Cal. 509; *State* v. *Common Pleas*, 38 N. J. Law, 182, and cases above cited.

So a mandamus is an appropriate remedy against a judge of a surrogate's court, in case of a refusal to allow an appeal from his court to which a party applying for the remedy may be entitled (*Gresham* v. *Pyron*, 17 Ga. 263); or for a refusal to enter up a judgment in such court, to which the party is entitled (*Williams* v. *Saunders*, 5 Coldw. [Tenn.] 60); or for a refusal of the judge to transfer to another court a cause in which he is personally interested. *State* v. *Castleberry*, 23 Ala. 85.

And a mandamus will issue to compel a justice of the peace to grant an appeal in a proper case (*Ex parte Martin*, 5 Ark. 371); and to compel a justice to assess damages in favor of the defendant in replevin in case of a discontinuance of the suit (*People* v. *Tripp*, 15 Mich. 518); and generally to compel the performance of a plain duty. *Forman* v. *Murphy*, 3 N. J. Law, 1024; *Terhune* v. *Barcalow*, 11 id. 38; *People* v. *Willis*, 5 Abb. Pr. 205.

The general doctrine in such cases is that a mandamus will not be allowed to interfere with the discretion of a court or officer, but will compel the exercise of it, in case this duty is clearly imposed. *People* v. *Sexton*, 37 Cal. 532; *People* v. *Dowling*, 55 Barb. 197; *State* v.

Judge, 26 La. Ann. 116; *People* v. *Judge*, 24 Mich. 408; *Mayor* v. *Rainwater*, 47 Miss. 547; *Weeden* v. *Town Council*, 9 R. I. 128.

§ 6. **Boards of public officers.** It is a doctrine universally recognized that boards of public officers may in appropriate cases be compelled by mandamus to perform a plain legal duty. Thus, it will lie to compel the board of education of a city, on behalf of a father, to admit his child to the public schools (*People* v. *Board of Education of Detroit*, 18 Mich. 400); to compel a board of police to discharge their duty as public officers, in levying a tax required by law, to pay a debt of the county, where the law has furnished no other specific remedy (*Carroll* v. *Board of Police*, 28 Miss. 38); to compel a board, having judicial and ministerial powers, to execute the decisions of a court, when the law imposes this duty (*People* v. *Schenectady*, 35 Barb. 408); to compel a contracting board to accept a bid for keeping in repair a public work, in a case where the duty was manifest, and the objection was captious and frivolous (*People* v. *Contracting Board*, 46 Barb. 254); to compel the commissioners of the poor to discharge duties imposed upon them by an act of the assembly of the State (*Commissioners* v. *Lynah*, 2 McCord [S. C.], 170); to compel the managers of a cemetery to permit the burial of persons entitled to sepulture therein (*Mount Moriah Cemetery Asso.* v. *Commonwealth*, 81 Penn. St. 235; S. C., 22 Am. Rep. 743); to compel the commissioners of highways to lay out and open a highway where the law imposes this duty upon them (*Treat* v. *Middletown*, 8 Conn. 243), or where it becomes their duty to open it after such road is laid out by a competent court (*People* v. *Champion*, 16 Johns. 61); to compel commissioners, appointed for that purpose, to appraise damages for land taken under the right of eminent domain (*Trustees* v. *Johnson*, 2 Ind. 219; *Ex parte Jennings*, 6 Cow. 518; *Dodge* v. *County Commissioners*, 3 Metc. 380; *Carpenter* v. *Bristol*, 21 Pick. 258); to compel the officers, designated for that purpose, to issue the bonds of a town, city or county, which under the provisions of the statute have been voted for some particular purpose, and to levy a tax for the purpose of paying interest upon such bonds lawfully issued (*Knox County* v. *Aspinwall*, 24 How. [U. S.] 376; *Morton* v. *Comptroller General*, 4 S. C. 430); to compel a board to contract, to accept the bid of the lowest bidder, where there is no discretion as to the matter, or the sufficiency of bonds which may be required. *People* v. *Contracting Board*, 46 Barb. 254; *Farman* v. *Commissioners*, 21 Ohio St. 311.

But, as we have before observed, where there is a discretion vested in such bodies, which is generally the case, no interference with such discretion, if reasonably exercised, will be made by the writ of mandamus. *The Press Association* v. *Nichols*, 45 Vt. 7; *People* v. *Con-*

tracting Board, 33 N. Y. (6 Tiff.) 382; *State* v. *Board of Education*, 24 Wis. 683. See, also, *People* v. *Croton Aqueduct Board*, 49 Barb. 259; *People* v. *Contracting Board*, 27 N. Y. (13 Smith) 378; *People* v. *Fay*, 3 Lans. (N. Y.) 398. And, generally, the writ will only compel action on the part of public boards or officers, and not direct them what their action shall be, where there is any discretion as to the mode of action. *People* v. *Supervisors*, 45 N. Y. (6 Hand) 196; *Tuolumne* v. *Stanislaus Co.*, 6 Cal. 440; *People* v. *Supervisors*, 11 id. 42. See, also, *People* v. *Green*, 6 N. Y. Sup. (T. & C.) 129: S. C., 3 Hun (N. Y.), 755; S. C. affirmed, 63 N. Y. (17 Sick.) 62

§ 7. **Sheriffs, etc.** An executive officer, who is required by law to serve process, may be required by mandamus to perform all merely ministerial or executive duties imposed upon him, even although the party interested in the performance of the duty, may have a remedy at law against him and his sureties for a failure so to do. *Fremont* v. *Crippen*, 10 Cal. 211; *People* v. *McClay*, 2 Neb. 7; *Williams* v. *Smith*, 6 Cal. 91; *People* v. *Fleming*, 4 Denio, 137. And where it was incumbent on him by law to keep his office at the county seat, it was held proper to issue a mandamus to compel this duty. *State* v. *Eaton*, 11 Wis. 27; *State* v. *Walker*, 5 S. C. 263. So, where an officer erased a part of his indorsement, made as required by law, upon a writ of attachment, and made other indorsements thereon, it was held that mandamus was proper to compel him to restore the erased part. *Ward* v. *Curtiss*, 18 Conn. 290. So, a jailer may be compelled by mandamus to deliver the body of a prisoner who has died in his custody. *Reg.* v. *Fox*, 2 Ad. & E. (N. S.) 247. And it will lie to compel a sheriff to execute a proper deed to a purchaser of lands on execution. *The People* v. *Ransom*, 2 N. Y. (2 Comst.) 490. See, also, *Van Rensselaer* v. *Sheriff*, 1 Cow. 501.

§ 8. **Clerks of courts.** Where a county or other clerk of a court improperly refuses to perform a ministerial duty imposed upon him by the law, and pertaining to his office, a mandamus is the proper remedy to compel performance; as where he is required to issue a certificate of election to a certain officer (*Brower* v. *O'Brien*, 2 Ind. 423; *People* v. *Rives*, 27 Ill. 242); to receive and file an official bond or administer the oath of office to an officer (*People* v. *Fletcher*, 2 Scam. [Ill.] 482); to deliver a transcript on a writ of error or appeal (*Davis* v. *Carter*, 18 Tex. 400); to compel him to record a judgment, deed or other matter, when the law makes it his duty to do so (*People* v. *Miner*, 37 Barb. 466; *Silver* v. *The People*, 45 Ill. 225; *Commonwealth* v. *Supervisors*, 29 Penn. St. 121); or to accept and file a bond, when he is invested with no discretion as to its sufficiency (*Gulick* v. *New*, 14

Ind. 93); to issue any process which it is made his duty to issue (*People* v. *Gale*, 22 Barb. 502; *Draper* v. *Noteware*, 7 Cal. 276); as a citation (*Ex parte Carnochan*, Charlt. [Ga.] 216); an execution upon final judgment (*People* v. *Gale*, 22 Barb. 502); a writ of possession (*People* v. *Loucks*, 28 Cal. 68); of assistance (*Attorney-General* v. *Lum*, 2 Wis. 507); or any process that by law it is made his duty to issue (*Rodgers* v. *Alexander*, 35 Tex. 116); and that the relator has a clear and undoubted right to have it issue. *Com.* v. *Supervisors*, 29 Penn. St. 121; *Draper* v. *Noteware*, 7 Cal. 276; *Williams* v. *Judge*, 27 Mo. 225.

It has been held in some States that, where the party has a clear remedy against the clerk for damages for a refusal to perform his duty in the issue of process, as by refusing to issue execution, this remedy will be denied. *Goodwin* v. *Glazer*, 10 Cal. 333; *Fulton* v. *Hanna*, 40 id. 278. But the better doctrine, and the weight of authority seems to be that, where the remedy at law does not afford as full and ample redress, this remedy may be resorted to. *Attorney-General* v. *Lum*, 2 Wis. 507.

And, generally, the test may be said to be whether the remedy at law will furnish the specific relief sought by mandamus. *People* v. *Loucks*, 28 Cal. 68.

If, however, a specific relief is provided by statute, such remedy must be resorted to, and a mandamus will not lie; but the mere fact that an action for damages will lie against him or upon his official bond does not defeat the remedy. The question is, whether there is another remedy by which the same specific relief may be had. *People* v. *Loucks*, 28 Cal. 68.

And, in all cases, the question whether a mandamus will lie or not is to be determined by the question whether the act is purely ministerial; for, if he is invested with any discretion in reference to the act to be done, the remedy will be denied. *Swan* v. *Gray*, 44 Miss. 393; *Fulton* v. *Hanna*, 40 Cal. 278; *Kendall* v. *United States*, 12 Pet. (U. S.) 524; *Bryan* v. *Cattell*, 15 Iowa, 538; *People* v. *Loucks*, 28 Cal. 68. See, also, *ante*, 361, § 5, for a further consideration of the application of mandamus to clerks.

§ 9. **President and his cabinet.** On general principles, it may, perhaps, be safely affirmed that the president of the United States cannot be compelled to perform any act pertaining to his office, whether judicial or not. He is treated as being invested with a discretion as to every official act, and is only amenable for acts of omission and commission to the tribunal designated by the constitution. See *post*, 366, § 10. But a different rule prevails as to the members of his cabinet, and where by

law they are required to discharge certain duties, or perform certain acts, and they are invested with no discretion in relation thereto, that is, where certain acts are required of them that are purely ministerial, and do not require the exercise of official judgment, they are amenable to mandamus. Thus, the postmaster-general has been compelled by mandamus to enter credits upon the books of his office to parties entitled thereto. *Kendall* v. *United States*, 12 Pet. (U. S.) 526. But, where there is any discretion vested in the head of a department as to the act sought to be enforced, the remedy will be denied, and the instances in which the remedy can be had are rare. *Reeside* v. *Walker*, 11 How. (U. S.) 272; *United States* v. *Guthrie*, 17 id. 284; *Decatur* v. *Paulding*, 14 Pet. (U. S.) 497; *Brashear* v. *Mason*, 6 How. (U. S.) 92; *United States* v. *Land Commissioner*, 5 Wall. 563; *The Secretary* v. *McGarrahan*, 9 id. 298.

§ 10. **Governors and secretaries.** Whether a mandamus will lie from a State court to the governor, to compel the performance of an executive duty, is a matter about which considerable conflict exists. It is held in several of the States that it does lie to enforce a merely ministerial act not strictly comprehended under his executive and political functions. Thus, a mandamus has been held to be the proper remedy to compel him to give a certificate or commission to an officer duly elected to a particular office. *Magruder* v. *Swann*, 25 Md. 173. To sign and execute a patent for lands sold by the State according to law (*Middleton* v. *Law*, 30 Cal. 596); to issue a proclamation as required by law that a banking corporation had complied with the law and was entitled to do business as such (*State* v. *Chase*, 5 Ohio St. 528); to compel him to draw a warrant upon the treasurer for the payment of certain sums, payment of which was directed by law (*Tenn. R. R. Co.* v. *Moore*, 36 Ala. 371); to authenticate as a law a bill which had duly passed the legislature (*Harpending* v. *Haight*, 39 Cal. 189; 2 Am. Rep. 432); to draw a warrant upon the treasurer to pay the salary of a State officer, as fixed and required by law. *Cotten* v. *Ellis*, 7 Jones (N. C.), 545.

But, while the State courts, from the reports of which the preceding cases have been collected, assert the right to compel executive action by this process, the weight of authority is opposed to the exercise of such power by the courts for any purpose, upon the theory that the chief executive officer of the State must be regarded as invested with a discretion as to every official act. *People* v. *Yates*, 40 Ill. 126; *Hawkins* v. *The Governor*, 1 Ark. 571; *Chamberlain* v. *Sibley*, 4 Minn. 309; *Mauran* v. *Smith*, 8 R. I. 192; 5 Am. Rep. 564; *State* v. *Warmoth*, 22 La. Ann. 1; 2 Am. Rep. 712; *State* v. *Towns*, 8 Ga. 360; *In re Dennett*,

32 Me. 508; *Com.* v. *Dennison*, 24 How. (U. S.) 66; *Houston, etc. R. R. Co.* v. *Randolph*, 24 Tex. 317; *People* v. *Governor*, 29 Mich. 320; S. C., 18 Am. Rep. 89.

That the heads of the executive departments of the State government, as the secretary of State, secretary of the treasury, etc., may, by mandamus, be compelled to perform purely ministerial duties imposed upon them by law, would not seem to be doubtful. Thus, it has been issued to compel the secretary of State to deliver a commission to a person entitled thereto (*Marbury* v. *Madison*, 1 Cranch [U. S.], 137); to compel him to furnish a copy of the laws to a person entitled thereto (*State* v. *Barker*, 4 Kans. 379); to compel him to affix his official seal to the commission of a person appointed to fill a certain office, by the governor (*State* v. *Wrotnowski*, 17 La. Ann. 156); to compel the State treasurer to deliver to a party a mortgage of lands executed to the State, to be used as evidence in a cause (*D'Oyley's Case*, 1 Brev. [S. C.] 238); to compel the payment of a warrant drawn upon the treasury (*State Bank* v. *Hastings*, 15 Wis. 75); or a debt against the State, the amount of which has been ascertained according to law (*McDougal* v. *Roman*, 2 Cal. 80); to compel him to give a notice required by law (*People* v. *State Treasurer*, 4 Mich. 27); to compel the State auditor to issue his warrant for the payment of a claim duly audited (*Lindsey* v. *Auditor*, 3 Bush [Ky.], 231; *Swann* v. *Buck*, 40 Miss. 268); to issue circulating notes to a bank that by law is entitled thereto (*Citizens' Bank* v. *Wright*, 6 Ohio St. 318); and, generally, to compel the performance by such officers, of any official act, purely ministerial. *Commissioners of the Land Office* v. *Smith*, 5 Tex. 471; *Bryan* v. *Cattell*, 15 Iowa, 538.

And in Pennsylvania a mandamus lies to the secretary of a land office to compel him to make the calculations of purchase-money and interest on lands sold, if he has omitted, or wholly refused to do so, but not to direct in what manner he shall make such calculations. *Commonwealth* v. *Cochran*, 5 Binn. 87.

§ 11. **Attorney-general.** The attorney-general of a State may by this process be compelled to perform a purely ministerial act. But when the process would be fruitless to enforce the right sought to be enforced, it will not be granted. *People* v. *Tremain*, 29 Barb. 96. In the case last cited, it was sought to compel the making of a certificate by the attorney-general, that an action brought in the name of the people was properly brought as a preliminary requirement, to a payment of the defendant's claim against the State, and it appeared that there was no appropriation out of which it could be paid. So it has been denied where it was sought to compel him to institute

quo warranto proceedings, when the term of office would expire before any effectual action could be had. *Woodbury* v. *County Comm'rs*, 40 Me. 304. It would seem that the remedy cannot be had to compel him to institute *quo warranto* or other proceedings, unless the statute makes it his imperative duty to do so. Otherwise he is treated as vested with a discretion, whether an action should be brought or not, and the courts will not interfere therewith. *People* v. *Attorney-General*, 22 Barb. 114.

§ 12. **Treasurers and payment of money.** When the relator has no other adequate remedy, a mandamus will issue to compel the payment of warrants or properly audited claims against the State, by the State treasurer, when by law he is required to pay the same, and there is money in the treasury out of which they can lawfully be paid. *State Bank* v. *Hastings*, 15 Wis. 75; *Swann* v. *Buck*, 40 Miss. 268; *McDougal* v. *Roman*, 2 Cal. 80.

When the law provides that claims against the State shall be audited by a particular officer, and warrants upon the treasury drawn for the amount found to be due, a mandamus lies to compel both the audit and the drawing of the warrant. *Fowler* v. *Peirce*, 2 Cal. 165; *McCauley* v. *Brooks*, 16 id. 11; *Swann* v. *Buck*, 40 Miss. 268. A mandamus can only issue against a State treasurer when he has money, and illegally withholds it from one entitled to be paid. *State* v. *Dubuclet*, 26 La. Ann. 127. See *State* v. *Hobart*, 12 Nev. 408.

§ 13. **Election canvassers.** While a mandamus does not lie to try and determine the title to an office, yet a board of canvassers whose duties are merely ministerial, and who have no power to determine upon the validity of an election or the returns, may by this process not only be compelled to receive and count votes rejected by them, but also to canvass all the returns in their possession. *Florida* v. *Gibbs*, 13 Fla. 55; S. C., 7 Am. Rep. 233; *State* v. *County Judge*, 7 Iowa, 186; *Clark* v. *McKenzie*, 7 Bush (Ky.), 523; *Ellis* v. *County Comm'rs*, 2 Gray (Mass.), 370; *Kisler* v. *Cameron*, 39 Ind. 488; *State* v. *Dinsmore*, 5 Brown (Neb.), 145. And the fact that they have met and made the canvass, and made their return thereof, and adjourned *sine die*, does not defeat the remedy. They may be compelled to reassemble and re-canvass the returns, and the court will direct that all the returns shall be canvassed. *Florida* v. *Gibbs*, 13 Fla. 55; S. C., 7 Am. Rep. 233. But if it is shown that the election is illegal, the remedy will be denied. *State* v. *Robinson*, 1 Kan. 17. But the fact that fraud and bribery in the election is alleged, will not be considered as a reason for refusing it. *State* v. *County Judge*, 7 Iowa, 186;

Lewis v. *Commissioners of Marshall County*, 16 Kan. 102; S. C., 22 Am. Rep. 275.

The remedy in such cases cannot be applied for until the time arrives when they are to act, nor until it is apparent that they do not intend to canvass all the returns, or those that *prima facie* should be canvassed; and mere threats made by them before the time for making the canvass arrives, not to canvass certain returns, are not sufficient to warrant the issuance of the writ, until the time for them to act has arrived. *State* v. *Carney*, 3 Kan. 88.

A mandamus will also lie, to compel the return judges of an election to count the votes duly certified to them, and give a certificate of election in accordance therewith. *Thompson* v. *Ewing*, 1 Brewst. (Penn.) 67; *Commonwealth* v. *Emminger*, 74 Penn. St. 479.

Not only will a mandamus lie to compel action by them, but the court will also direct what returns shall be canvassed, and, when the law makes it their duty to do so, will compel the issue of a certificate of election to the person apparently entitled thereto. *Kisler* v. *Cameron*, 39 Ind. 488; *People* v. *Hilliard*, 29 Ill. 419; *In re Strong*, 20 Pick. 484.

But where the board is made the judges of the sufficiency or validity of the returns, or is in any respect invested with a discretion in respect thereto, the remedy will be denied. *Arberry* v. *Beavers*, 6 Tex. 457; *Mayor of Vicksburgh* v. *Rainwater*, 47 Miss. 547; *Grier* v. *Shackleford*, 3 Brev. (S. C.) 549.

§ 14. **Supervisors and county officers.** Boards of supervisors and county officers generally may be compelled by mandamus to discharge all ministerial duties incidental to their office. Thus, a board of supervisors may, by this process, be compelled to levy a tax to repay a tax illegally assessed and collected, and which the legislature has directed them to refund (*People* v. *Supervisors of Otsego*, 51 N. Y. [6 Sick.] 401); to admit and allow claims against the county (*People* v. *Supervisors of N. Y.*, 32 N. Y. 473; *People* v. *Supervisors*, 3 Mich. 475; *People* v. *Supervisors*, 21 How. [N. Y.] 322); to renew a license when the applicant is entitled to a renewal (*Thomas* v. *Armstrong*, 7 Cal. 286); to levy a tax, and to have the same collected, to pay the indebtedness of the county (*State* v. *Harris*, 17 Ohio St. 608; *State* v. *County Judge*, 12 Iowa, 237; *Morgan* v. *The Commonwealth*, 55 Penn. St. 456); to reduce a tax, when the applicant is entitled to have it reduced (*Adriance* v. *Supervisors*, 12 How. [N. Y.] 224); as to compelling them to designate newspapers in which the county printing shall be done, and to designate a particular paper, when by law such paper is entitled thereto (*Express Company* v. *Supervisors of Albany Co.*, 1877, Gen.

Term; *People* v. *Supervisors of Hamilton Co.*, 9 Hun, 60, reversed by court of appeals); or any duty that the law requires them to perform at their annual meeting. *People* v. *Chenango*, 8 N. Y. (4 Seld.) 317.

It is also an appropriate remedy to compel them to levy a tax to pay bonds or the coupons thereof, issued by the county, when by law they have the power to pay them (*Knox Co.* v. *Aspinwall*, 24 How. [U. S.] 376; *English* v. *Supervisors*, 19 Cal. 172); to compel them to subscribe for stock in a railroad, when a vote to that effect has been passed (*Napa Valley R. R. Co.* v. *Napa Co.*, 30 Cal. 435; *Piatt* v. *People*, 29 Ill. 54); to compel them to audit the accounts of the county sheriff, as jailer, for receiving, discharging and boarding prisoners committed by the officers of a city for misdemeanors and violations of city ordinances (*People* v. *Supervisors of Columbia County*, 67 N. Y. [22 Sick.] 330); and, generally, to discharge any ministerial functions imposed upon the board. *People* v. *Chenango*, 8 N. Y. (4 Seld.) 317; *Commonwealth* v. *Johnson*, 2 Binn. (Penn.) 275; *State* v. *Supervisors of Wood County*, 41 Wis. 28.

County auditors may be compelled by mandamus to audit claims against the county, and, when it is their duty to do so, to draw a warrant upon the treasury for the amount found due. But the office of the writ will not be extended beyond merely setting them in motion. It will not direct what their action shall be. *Burnet* v. *Auditor of Portage County*, 12 Ohio, 54.

Thus, it will compel him to audit a claim against the county for food, etc., furnished to the jury in a criminal cause, when they are kept together for several days. *State* v. *Auditor of Hamilton County*, 19 Ohio, 116; *Tuolumne Co.* v. *Stanislaus Co.*, 6 Cal. 440; *People* v. *Supervisors*, 32 N. Y. 473. And it will be issued to compel him to draw his warrant for a sum appropriated by the board of supervisors. *State* v. *Buckles*, 39 Ind. 272.

Mandamus also lies to compel a county treasurer to pay a warrant properly drawn upon the treasury, or a claim properly audited and allowed against the county, when there is money in his hands out of which it can lawfully be paid (*People* v. *Edmonds*, 19 Barb. 472; *Baker* v. *Johnson*, 41 Me. 15); to compel him to pay a sheriff the amount of his fees, admitted and allowed by the court (Id.); unless the claim has been illegally or improperly allowed. *People* v. *Stout*, 23 Barb. 349; *People* v. *Lawrence*, 6 Hill, 244.

The fact that there are no funds in the hands of the treasurer out of which the warrant or claim can be paid, is not a bar to this remedy, if a specific fund for such purposes has been provided, and the treasurer has improperly applied it to other purposes. *Adsit* v. *Brady*, 4 Hill,

634; *Huff* v. *Knapp*, 5 N. Y. (1 Seld.) 65; *People* v. *Stout*, 23 Barb. 339. So a mandamus lies to compel a register to comply with the law requiring him to deposit with the county clerk, at the close of his duties, the books of his office. *McDiarmid* v. *Fitch*, 27 Ark. 100.

County commissioners, as well as all other county officers, may be compelled by mandamus to discharge any ministerial function incident to their office, which they unnecessarily neglect or refuse to perform, as to make a county rate, for a legal and proper purpose (*Com.* v. *Commrs. of Alleghany*, 32 Penn. St. 218); to certify that the relator had a majority of votes cast for a certain office, although they have certified that another person had, and such person is in possession of the office (*Ellis* v. *County Commissioners*, 2 Gray, 370); or to receive a sheriff's bond and permit him to qualify. *State* v. *Lewis*, 10 Ohio St. 128. See, also, *ante*, 363, § 6.

But it will not be authorized to control any discretion of the officer, at least where it is reasonably exercised. It will not in such cases direct what their action shall be, but only that they act. *People* v. *Supervisors*, 45 N. Y. (6 Hand) 196; *People* v. *Supervisors*, 11 Cal. 42. Nor will it issue when there is another plain and adequate remedy. *People* v. *Mayor*, 25 Wend. 680; *State* v. *Supervisors*, 29 Wis. 79; *Mansfield* v. *Fuller*, 50 Mo. 338; *People* v. *Clark*, 50 Ill. 213; *Dubordieu* v. *Butler*, 49 Cal. 522.

§ 15. **Municipal corporations.** A municipal corporation may be compelled by mandamus to levy a tax to meet its obligations either in the form of a funded debt, or a judgment. *Galena* v. *Amy*, 5 Wall. (U. S.) 705. And it has been held that it was the appropriate remedy against a city, instead of a bill in equity, to compel it to pay a judgment against it. *Walkley* v. *Muscatine*, 6 Wall. (U. S.) 481; *State* v. *Milwaukee*, 20 Wis. 87. And to compel the levy and collection of a tax where it is the manifest duty of the city so to do. *Chapin* v. *Osborn*, 29 Ind. 99; *State* v. *Keokuk*, 9 Iowa, 438; *Coy* v. *City of Lyons*, 17 id. 1.

And where a municipal corporation issued bonds in payment of a subscription to the stock of a railroad, it was held proper to compel the corporation by mandamus to levy a tax for the purpose of paying the interest on such bonds. *Flagg* v. *Palmyra*, 33 Mo. 440. See, also, same doctrine in *Morgan* v. *Commonwealth*, 55 Penn. St. 456. So it is a proper remedy against an officer of a city whose duty it is to execute and deliver its bonds to the relator, to compel him to do so (*People* v. *Brennan*, 39 Barb. 651. And see *Stockton R. R. Co.* v. *Stockton*, 51 Cal. 328); to compel an officer to perform a duty imposed by law, of uniting with others in the selection of a newspaper in which

to advertise matters required to be advertised (Id.); to compel the issuance of precepts for the collection of an assessment for city improvements, where such duty is imposed upon the city council (*Chapin* v. *Osborn*, 29 Ind. 99); against collectors of cities for failure to pay over taxes collected as required by law (*State* v. *Hammell*, 31 N. J. Law, 446; *People* v. *Haws*, 36 Barb. 59); to compel a city council to issue stock in a public fund authorized to be created for the purpose of erecting a public market (*People* v. *Common Council of N. Y.*, 45 Barb. [N. Y.] 473); to compel a common council to proceed with the opening of a street where it is their duty so to do; and a party, who is entitled to damages awarded him for lands taken therefor, is authorized to make the application. *People* v. *Common Council of Syracuse*, 20 How, (N. Y.) 491.

In all cases where there is a plain duty to be performed by an officer, board or municipal corporation, and there is no discretion to be exercised in the performance of it, and there is no other adequate remedy, a mandamus is the appropriate remedy to command its performance in favor of the party injured by its non-performance. And there need not be a positive refusal to perform the duty enjoined, to authorize the interposition of the court by *mandamus*. It is sufficient if there is unreasonable delay, and a manifest intention not to perform it. *Cleveland* v. *Board of Finance*, 38 N. J. Law, 259.

Under such circumstances the books and papers of an office may be secured by a successor in office from his predecessor. *Proprietors of Church* v. *Slack*, 7 Cush. 226; *Commonwealth* v. *Athearn*, 3 Mass. 285; *King* v. *Round*, 4 Ad. & El. 139; *Kimball* v. *Lamprey*, 19 N. H. 215; *Parish* v. *Stearns*, 21 Pick. 148; *Bates* v. *Plymouth*, 14 Gray, 163; *City of Keokuk* v. *Merriam*, 44 Iowa, 432. So, in England, a mandamus lies to compel a municipal corporation to select a mayor and other corporate officers. *Rex* v. *Cambridge*, 4 Burr. 2008; *Rex* v. *Leyland*, 3 M. & S. 184; *Rex* v. *York*, 4 T. R. 699; *Regina* v. *Leeds*, 7 A. & E. 963. And in this country it has been held that the proper officers may be compelled by mandamus to give notice of an election required by law. *People* v. *Fairbury*, 51 Ill. 149. So, such a corporation may be compelled to appoint and hold a special election. *State* v. *Rahway*, 33 N. J. Law, 110. And a common council may be required by mandamus to hold a meeting to appoint certain corporate officers (*Lamb* v. *Lynd*, 44 Penn. St. 336; *Attorney-General* v. *City Council*, 111 Mass. 90); to act as canvassers and judges of elections. Id. And it is an appropriate remedy to compel an election officer, on the relation of a voter, to announce the vote of an election (*People* v. *Salomon*, 46 Ill. 415); to compel the proper officers to give a certificate of election to the

person entitled to it (*State* v. *The Judge, etc.*, 13 Ala. 805; *Strong, Petitioner*, 20 Pick. 484; *O'Farell* v. *Colby*, 2 Minn. 180; *State* v. *Loomis*, 5 Ham. (Ohio) 358); to compel a municipal corporation to act upon the sufficiency of sureties offered by a person elected to a municipal office (*Commonwealth* v. *City Council of Phila.*, 7 Am. L. R. [N. S.] 362); to compel the proper officers, on the division of towns, to apportion the money between them as provided by law (*People* v. *Marsh*, 2 Cow. 493); to compel officers to issue bonds, authorized and due for public improvements (*People* v. *Flagg*, 11 Am. L. R. 80; *People* v. *White*, 54 Barb. 622); to compel a mayor to perform his duty as presiding officer (*Rex* v. *Everitt*, Cas. temp. Hard. 261; *Rex* v. *Williams*, 2 M. & S. 141); to compel the proper officer of a city to issue a license to one entitled thereto (*East St. Louis* v. *Wider*, 46 Ill. 351; *Hall* v. *Supervisors*, 20 Cal. 591); to compel county commissioners to make a record of their action, that an appeal may be taken (*Commissioners* v. *State*, 15 Ind. 250); to compel the proper officer to record a deed or paper (*People* v. *Collins*, 7 Johns. 549); to compel the proper persons to receive and file a petition as required by law (*Hawkins* v. *County Coms.*, 14 Ind. 521); and to compel a city marshal to restore property levied on for taxes, to a claimant, on receiving the bond surety required therefor by statute. *Mitchell* v. *Hay*, 37 Ga. 581.

But a mandamus will not lie to compel the mayor of a city to perform a duty which belongs solely to its common council. *State* v. *City of Shreveport*, 29 La. Ann. 658.

§ 16. **Private corporations.** As corporations are in the law only artificial persons, they as well as individuals may invoke the aid of a mandamus, where they have an interest in the performance of a duty imposed by law upon an individual officer, or other corporation, the performance of which is neglected or refused. And the same circumstances that would entitle an individual to the remedy, would give it to a private corporation. *Insurance Co.* v. *Mayor*, 23 Md. 296; *Chicago, etc., R. Co.* v. *People*, 56 Ill. 365; *Indianapolis, etc., R. Co.* v. *State*, 37 Ind. 489; *State* v. *Southern Minn. R. Co.*, 18 Minn. 40; *Reg.* v. *London, etc., R. Co.*, 13 Q. B. 998; *Reg.* v. *Wing*, 17 id. 645; *Reg.* v. *Midland, etc., R. Co.*, 15 Ir. Co. L. R. 525. Thus a private corporation may, by this process, compel the commissioner of a land office to issue a certificate for lands to which the corporation may be entitled. *Houston, etc., R. Co.* v. *Commissioner*, 36 Tex. 382. And may compel county officers to levy a tax on the county to satisfy a judgment rendered on bonds issued as provided by law. *Riggs* v. *Johnson Co.*, 6 Wall. (U. S.) 166; *Mayor* v. *Lord*, 9 Wall. 409; *Supervisor* v. *Durant*, id.

736. And they may claim the benefit of a mandamus against persons wrongfully claiming to hold its offices. *American R. Frog Co.* v. *Haven*, 101 Mass. 398; 3 Am. Rep. 377.

It may also be invoked against private corporations. Instances of this character are as follows: It may be used to compel a corporation to keep a register and insert therein the names of the stockholders, if this duty is imposed by law, or the provisions of the charter (*Norris* v. *Irish Land Co.*, 8 El. & Bl. 525; *Swan* v. *North British, etc., Co.*, 31 L. J. Ex. 425); to swear in one as director who has been lawfully elected (2 Str. 696); to allow the members all the privileges of membership (*Dacosta* v. *The Russia Co.*, 2 Str. 783); to compel a railroad or canal company, to build or repair its road or canal (*People* v. *Troy, etc., R. Co.*, 37 How. Pr. 427; *Habersham* v. *Canal Co.*, 26 Ga. 665); to compel a railroad company to so grade its track as to make the crossings practically convenient and useful (*Chicago, etc., R. Co.* v. *People*, 56 Ill. 365); to so construct its road across streams as not to interfere with navigation (*State* v. *Northern R. Co.*, 9 Rich. [S. C.] 247), and to compel the cashier of a bank to allow a director to examine the books of the bank. *People* v. *Throop*, 12 Wend. 183.

The remedy by mandamus is also frequently used to compel the production, inspection, or surrender of the books, records, etc., of corporations, to those entitled thereto. *American Ry. Frog Co.* v. *Haven*, 101 Mass. 398; 3 Am. Rep. 377; *State* v. *Goll*, 3 Vroom (N. J.), 285; *St. Luke's Church* v. *Slack*, 7 Cush. 226; *People* v. *Pacific Mail Steam Ship Co.*, 50 Barb. 280.

Nor will it ordinarily furnish grounds to excuse the production of books and papers of a private corporation, under this process, that they contain accounts between the corporation and its stockholders and are, therefore, of a confidential character. *People* v. *Pacific Mail Steamship Co.*, 50 Barb. 280; 34 How. 103; 3 Abb. (N. S.) 364.

This remedy is also frequently appropriate to compel the proper officer of the corporation to give a proper certificate of the transfer of shares of the capital stock (*Bailey* v. *Strohecker*, 38 Ga. 259); to enter upon the proper books of the company a record of the probate of the will of a deceased stockholder showing the disposition of his stock (*Rex* v. *Worcester, etc., Co.*, 1 Man. & Ray. 529); to compel a railroad company to carry its passengers to a particular terminus as provided by its charter (*State* v. *Hartford, etc., R. Co.*, 29 Conn. 538); to compel the replacement of a track taken up in violation of its charter (*King* v. *Severn, etc., R. Co.*, 2 B. & A. 644); and to compel the assessment of damages of lands taken under the right of eminent domain. *Queen* v. *Eastern Counties R. Co.*, 2 Ad. & E. (N. S.)

347; *King* v. *Water Works Co.*, 6 Ad. & E. 355; *Queen* v. *Trustees, etc.*, 8 id. 439; *Queen* v. *Deptford Pier Co.*, id. 910.

§ 17. **Town officers.** Mandamus also lies to compel the performance of ministerial duties by town officers.

Thus, it is an appropriate remedy to compel a town treasurer to pay money in his hands, on a proper order drawn upon him therefor (*Case* v. *Wresler*, 4 Ohio St. 561); to compel him to perform his duty in the recording of deeds or other papers (*Strong's Case*, Kirby [Conn.,]345); to compel the clerk of a school district to deliver the records of his office to his successor (*Taylor* v. *Henry*, 2 Pick. 397; *Commonwealth* v. *Athearn*, 3 Mass. 287); to compel selectmen to open a highway duly laid out, and pay the damages sustained thereby, where it was their duty so to do (*Treat* v. *The Inhabitants, etc.*, 8 Conn. 243); to compel a board of school directors to levy a tax to provide the necessary funds for the payment of orders issued by them, when there is no money in the hands of the treasurer to meet the same, and in violation of law, they refuse so to do (*Stevenson* v. *Township of Summit*, 35 Iowa, 462); to compel a justice to allow an appeal where the facts permit it (*Ex parte Martin*, 5 Ark. 371); to compel assessors to assess damages against a plaintiff where a judgment of discontinuance has been rendered (*People* v. *Tripp*, 15 Mich. 518); to compel a justice to issue an execution on a judgment rendered by him in favor of a party entitled to it (*Laird* v. *Abrahams*, 15 N. J. Law, 22); to compel the overseers of the poor to receive and maintain a pauper, under an order to that effect unappealed from (*Overseers of Porter* v. *Overseers, etc.*, 82 Penn. St. 275); or to compel a town clerk to record the proceedings of a town-meeting, as publicly declared by the moderator (*Hill* v. *Goodwin*, 56 N. H. 441); also, to correct his record to conform to such declaration. Id.

§ 18. **Miscellaneous.** This extraordinary legal process is sometimes an appropriate remedy, to compel the performance of the duty of officers, in criminal proceedings.

Thus, it has been held to be an appropriate remedy, where a judicial officer, before whom a prisoner is brought on a *habeas corpus*, improperly refuses to hear and decide on the evidence adduced concerning his guilt. *Ex parte Mahone*, 30 Ala. 49.

So it lies to compel a court to which a recognizance has been returned, to certify it to another court, where such duty is clear. *Johnson* v. *Randall*, 7 Mass. 340.

But it is not the appropriate proceeding to try the title to an office. See the next section.

ARTICLE II.

REMEDY, WHEN REFUSED.

Section 1. In general. We have already alluded to the concurrence of facts necessary to authorize the issuing of this extraordinary writ. See *ante*, 357, art. 1, § 1. Where these facts do not exist, the remedy should be refused. A few cases will illustrate this application of the law. Thus, the court will refuse a mandamus if the right of the party applying therefor is not clear, or if he has a legal remedy by an ordinary action, equivalent to a specific remedy. *United States* v. *Bank of Alexandria*, 1 Cranch (C. C.), 7; *People* v. *Judges*, 1 Doug. (Mich.) 319; *Williams* v. *Judge*, 27 Mo. 225; *State* v. *Graves*, 19 Md. 351; *Smith* v. *Chicago, etc., R. Co.*, 67 Ill. 191. Nor will it be granted to control the discretion of a person, officer, or board, conferred by law upon them, although they may be required to exercise it. *Giles' Case*, 2 Str. 881; *Rex* v. *Nottingham*, Sayer, 217; *Hull* v. *Supervisors*, 19 Johns. 259; *Louisville* v. *Kean*, 18 B. Monr. 9; *Commonwealth* v. *Henry*, 49 Penn. St. 530; *Magee* v. *Supervisors*, 10 Cal. 376; *The King* v. *Bristol Dock Co.*, 6 B. & C. 181; *Appling* v. *Bailey*, 44 Ala. 333; *Ex parte Crane*, 5 Pet. (U. S.) 190; *Dixon* v. *Field*, 10 Ark. 243; *Weeden* v. *Town Council*, 9 R. I. 128; *Mayor* v. *Rainwater*, 47 Miss. 547; *People* v. *Judge*, 24 Mich. 408; *Ex parte Newman*, 14 Wall. (U. S.) 152; *McDiarmid* v. *Fitch*, 27 Ark. 106; *State* v. *Warmoth*, 23 La. Ann. 76; *East Boston Ferry Co.* v. *Boston*, 101 Mass. 488.

Nor should it be allowed in cases involving numerous questions of law and of fact; and where many acts of parties connected with the matter may be valid or void, depending upon circumstances and facts attending them at the time, and which parol proof is necessary to establish. *United States* v. *Commissioner*, 5 Wall. (U. S.) 563. And as a general rule, a mandamus will not be granted where the right depends upon holding an act of the legislature unconstitutional. *People* v. *Stephens*, 2 Abb. Pr. (N. S.) 348; *Hall* v. *Supervisors*, 20 Cal. 591. Or where it becomes necessary to decide on the constitutionality of a law involving the interests of third persons. *Smyth* v. *Titcomb*, 31 Me. 272. Nor will it be allowed where the act sought to be performed is physically impossible (*Silverthorne* v. *Warren R. Co.*, 33 N. J. Law, 173; *State* v. *Police Jury*, 22 La. Ann. 611; *Ackerman* v. *Desha Co.*, 27 Ark. 457; *Ball* v. *Lappius*, 3 Oreg. 55; *People* v. *Salomon*, 54 Ill. 39; *Commonwealth* v. *Baroux*, 36 Penn. St. 262); or, in general,

to command an act prohibited by injunction. *Railroad Co.* v. *Wyandot Co.*, 7 Ohio St. 278; *Ex parte Fleming*, 4 Hill, 581. But this doctrine was held not to apply in case of an injunction issued by a State court to enjoin a levy of taxes by the proper officers of a county to satisfy a judgment of a circuit court of the United States, as, if the injunction should be allowed in such a case to defeat the rights of the judgment creditor to a mandamus, to compel the proper officers to levy the requisite tax to satisfy the judgment obtained against it, the judgment of the court could not be enforced, and its powers would be useless. *Riggs* v. *Johnson Co.*, 6 Wall. (U. S.) 166. See, also, *Mayor* v. *Lord*, 9 id. 409; *Supervisors* v. *Durant*, id. 736; *Weber* v. *Lee County*, 6 id. 210.

Nor will a mandamus be granted where the defendant has no power to perform the act required (*People* v. *Supervisors*, 15 Barb. 607; *People ex rel. Stevens* v. *Hoyt*, 66 N. Y. [21 Sick.] 606); or where it would be fruitless (*Commonwealth* v. *Supervisors*, 29 Penn. St. 121); or to compel the doing of an unlawful act (*Gillespie* v. *Wood*, 4 Humph. (Tenn.) 437; *Ross* v. *Lane*, 11 Miss. 695; *People* v. *Fowler*, 55 N. Y. [10 Sick.] 252); or where it is not one incident to the defendant's duties (*State* v. *County Judge*, 12 Iowa, 237; *Pucket* v. *White*, 22 Tex. 559); or to enforce a mere contract (*State* v. *Zanesville, etc., Co.*, 16 Ohio St. 308); or, generally, to try the title to an office (*Underwood* v. *Wylie*, 5 Ark. 248; *Bonner* v. *State*, 7 Ga. 473; *People* v. *Stevens*, 5 Hill, 615; *People* v. *Detroit*, 18 Mich. 338; *Brown* v. *Turner*, 70 N. C. 93); or to prevent an anticipated failure of duty (*State* v. *Burbank*, 22 La. Ann. 298; *State* v. *Dubuclet*, 24 id. 16; *State* v. *Carney*, 3 Kan. 88); or to compel payment of even liquidated damages (*Haygood* v. *Justices, etc.*, 19 Ga. 97); or to try the title to a public office. *Denver* v. *Hobart*, 10 Nev. 28; *Meredith* v. *Supervisors*, 50 Cal. 433.

The courts of the United States can impart no taxing power to a municipal corporation, and an attempt by them to compel by mandamus the levy of a tax not authorized by the laws of the State, would be an abuse of the writ. *Vance* v. *City of Little Rock*, 30 Ark. 435; *United States* v. *City of New Orleans*, 2 Wood (C. C.), 230.

§ 2. **Judges of superior courts.** It is evident on general principles that the judges of superior courts could not be compelled by mandamus to do any act, as the writ can only issue from a superior to an inferior tribunal, where this extraordinary remedy is sought against a court. 3 Bl. Com. 110.

By statute in New York, the supreme court, at a general term, may issue writs of mandamus and prohibition directed to any special term of

said court, or to any justice thereof holding such term or sitting at chambers, and may hear, adjudge, and determine the same, and enforce such determination in the same manner and with the same effect, in all respects, as in the like proceedings when the writs are directed to inferior courts and judges thereof. Laws of N. Y. 1873, ch. 70, § 1.

§ 3. **Inferior courts in civil cases.** As a general rule, a superior court will not grant a mandamus to an inferior court, compelling it to act in a particular direction or manner where the act sought to be enforced would in any manner interfere with the discretion of the court in the matter, or with its judgment where it had jurisdiction. *Clark* v. *Minnis*, 50 Cal. 509; *Ex parte Flippin*, 94 U. S. (4 Otto) 348.

Thus, after final judgment of the court upon matters within its jurisdiction, a mandamus will not lie to compel it to avoid the effect of the judgment (*State* v. *Bowen*, 6 Ala. 511), though it may be compelled to exercise the judgment or discretion conferred upon it. *Ex parte Hutt*, 14 Ark. 368; *Roberts* v. *Holsworth*, 10 N. J. Law, 57. Nor will it lie to compel the district court of the United States to set aside a judgment entered upon default (*Ex parte Roberts*, 6 Pet. 216); or to compel such court to decide a cause in a particular manner (*Life Ins. Co.* v. *Adams*, 9 Pet. 573); or to require a district judge of such court to show cause why execution was not issued in a certain case, where judgment had been obtained (*Postmaster* v. *Trigg*, 11 Pet. 173); or to compel such judge to reverse a decision made on argument, a writ of error or appeal being the proper course (*Ex parte Flippin*, 94 U. S. [4 Otto] 348; *Ex parte Hoyt*, 13 Pet. 279); also same principle in *Chase* v. *Blackstone Canal*, 10 Pick. (Mass.) 244; *Gray* v. *Bridge*, 11 id. 189; *State* v. *Lafayette*, 41 Mo. 222; *Squier* v. *Gale*, 6 N. J. Law, 157); or to compel such court to proceed according to the usages of practice of a court of equity (*Ex parte Whitney*, 13 Pet. 404; *Gaines* v. *Relf*, 15 id. 9); or to direct a judge to declare an election void (13 Ala. 805); or to vacate an order suppressing a deposition (*Ex parte Elston*, 25 Ala. 72); or to compel a judge of a district court to try a cause transferred by him to the circuit court (*Francisco* v. *Manhattan Ins. Co.*, 36 Cal. 283); or to compel a judge to sign a bill of exceptions, which is not in accordance with his judgment of the facts (*Shepard* v. *Peyton*, 12 Kans. 616; *People* v. *Jameson*, 40 Ill. 93; *Jamison* v. *Reid*, 2 Greene [Iowa], 394; *State* v. *Noggle*, 13 Wis. 380); or to compel a court to correct errors of judgment by annulling what they have done, or to guide their discretion (*Dunklin County* v. *District Court*, 23 Mo. 449); or to do an act lying entirely within its discretion (*Sinnickson* v. *Corwine*, 26 N. J. Law, 311; *City of Louisville* v. *Kean*, 18 B.

Monr. 9); or to secure a revision of the judgment of the court. *Little* v. *Morris*, 10 Tex. 263; *People* v. *Judge*, 32 Mich. 190. Where a judge has determined that under the statutes of the State he is disqualified from hearing a cause, a mandamus does not lie to make him reverse that decision and to hear the cause. *State of Florida* v. *Van Ness*, 15 Fla. 317. Some of the decisions in the foregoing cases rested upon the ground that there was other specific and adequate remedy for the relator, which is always, as we have seen, sufficient to defeat an application for a mandamus. On this ground a mandamus will always be refused. *Ex parte Newman*, 14 Wall. 152; *Mansfield* v. *Fuller*, 50 Mo. 338.

§ 4. **Inferior courts in criminal cases.** The general principles of the law applicable to civil cases are equally applicable to criminal cases, and the judgment and discretion of the court cannot be controlled by mandamus, nor can such remedy be resorted to against the action of the court or judge, in relation to any matter where there is other adequate remedy at law. An erroneous decision cannot ordinarily be made the ground of review on mandamus. *Regina* v. *The Justices*, 28 Eng. L. & E. 160. Nor will obedience to writ of *habeas corpus* be enforced by mandamus. *People* v. *Edwards*, 66 Ill. 59. A remedial writ will not be directed to a judicial officer, after his office has expired, to compel him to vacate an illegal or void order. *Ex parte Trice*, 53 Ala. 546.

§ 5. **Boards of public officers.** The discretion of a board of auditors cannot be reviewed by mandamus (*Auditorial Board* v. *Hendrick*, 20 Tex. 60); nor can the action of selectmen and the clerk in deciding upon the qualification of electors. *Freeman* v. *Selectmen of New Haven*, 34 Conn. 406.

And it has been held that it would not lie against boards of public officers in the following cases:

At the suit of a private citizen, to compel a public board to perform an omitted duty, in a case where the relator is not directly injured by its non-performance (*People* v. *Regents of University*, 4 Mich. 98); to correct the judgment of a board of police of Mississippi (*Board of Police* v. *Grant*, 17 Miss. 77); to review the discretion of the local board of trustees of common schools, in respect to the discipline and management of a school (*People* v. *School Officers*, 18 Abb. Pr. 165); to compel school directors to exonerate and discharge a property owner from a school tax assessed by them against them (*School Directors* v. *Anderson*, 45 Penn. St. 388); to compel the managers of an election of sheriff to return a candidate as duly elected, after they have already certified to the governor that the election was null and void

(*State* v. *Bruce*, 3 Brev. [S. C.] 264); or to dictate to a board of supervisors and determine what its judgment shall be, where it acts judicially. *Tilden* v. *Sacramento Co.*, 41 Cal. 68.

§ 6. **Supervisors.** A mandamus will not be allowed against a board of supervisors in the following cases:

1. To compel them to issue a certificate of election to one whom they have declared not to be elected to an office. *Magee* v. *Supervisors*, 10 Cal. 376.

2. To order a special election claimed to be rendered necessary by the resignation of certain officers. *People* v. *Supervisors*, 14 Cal. 102.

3. To compel the clerk of the board to countersign bonds which the board are bound to issue, when he has not been directed by the latter so to do, and they have given him no opportunity to do it. *People* v. *San Francisco*, 27 Cal. 655.

4. To compel them to allow the amount claimed by a constable for serving subpœnas, the allowance of the claim being a matter of discretion. *Ex parte Farrington*, 2 Cow. 407.

5. To compel them to allow the salary of an associate judge of the general sessions, there being other adequate remedy at law for the relator. *Ex parte Lynch*, 2 Hill, 45.

6. To compel them to lay out a road where the necessary proceedings have not been had for that purpose. *State* v. *Supervisors*, 9 Wis. 554.

7. To compel them to allow a claim where they have a discretion as to the amount of a claim to be allowed against the county for services (*Hull* v. *Supervisors*, 19 Johns. 259; *Ex parte Benson*, 7 Cow. 363); or to draw an order upon the treasury if there is no money in the treasury to pay it. *Commonwealth* v. *Commissioners*, 5 Binn. 536.

§ 7. **Treasurers of counties.** The cases where the county treasurer cannot be compelled by mandamus to act may be illustrated by the following:

He cannot be compelled to pay a claim against the county where the supervisors exceeded their jurisdiction in allowing the claim. *People* v. *Lawrence*, 6 Hill, 244. See, also, as illustrating the doctrine in this case, *The People* v. *Stout*, 23 Barb. 349.

§ 8. **State executive officers.** It has been held that a mandamus would not lie against the governor of a State to compel him to grant a commission (*Hawkins* v. *Governor*, 1 Ark. 570); or to perform a ministerial act devolved upon him by the laws of the State (*Low* v. *Towns, Governor*, 8 Ga. 360); or to return a bill which, having passed the general assembly, and having been certified by the proper officers of both houses, is presented to him for his consideration (*Peo-*

ple v. *Yates*, 40 Ill. 120); or to issue a certificate to a railroad company, provided for by an act of congress, until the provisions of the law have been complied with. *State* v. *Kirkwood*, 14 Iowa, 162.

So it has been held, in Missouri, that the law, requiring the governor to grant a commission to the person who has received a proper certificate from the county court, of election as a county judge, is not a mere ministerial duty, but an official act imposed upon him by the constitution, and that the supreme court has no power to issue a mandamus to compel him to do so. *State* v. *Fletcher*, 39 Mo. 388.

Where no action can be maintained for a claim against the State, the courts will not permit them to be enforced circuitously by a mandamus against the treasurer. *Weston* v. *Dane*, 51 Me. 461. And where an auditor of State possessed judicial powers, it was held that the courts would not permit an inquiry into the exercise of them by mandamus. *People* v. *Adam*, 3 Mich. 427. So, in Missouri, it has been held that a mandamus would not lie to compel the State auditor to audit and settle a bill of costs, even though certified by the county judge and circuit attorney, as required by law (*State* v. *Fletcher*, 39 Mo. 388); or to compel the State treasurer to pay over the principal and interest of State bonds, without a special act of the legislature authorizing and commanding him to do so. *State* v. *Bishop*, 42 Mo. 504. So, in Texas, it has been held that a mandamus does not lie to compel the State treasurer to pay a warrant signed by the governor and attorney-general, acting as a board of school commissioners, though in accordance with the law, as his action in the premises is official, and he is not subject to the judiciary in that respect, but is the judge of his official duties. *Houston, etc., R. Co.* v. *Randolph*, 24 Tex. 317.

And a State treasurer cannot, by mandamus, be compelled to pay a debt which the general assembly has constitutionally directed him not to pay. *Wilson* v. *Jenkins*, 72 N. C. 5; *Shaffer* v. *Jenkins*, id. 275.

§ 9. **Municipal officers.** It has been held that a mandamus would not lie in the following cases: 1. In favor of one claiming to be clerk of a city to compel his predecessor to deliver up the books and papers of the office where he has another specific remedy under the statutes of the State. *People* v. *Stevens*, 5 Hill, 616.

2. In favor of a bidder on proposals for estimates where there is no contract made by him, and approved, as required by law, as until then he has no clear legal right. *People* v. *Croton Aqueduct Board*, 26 Barb. 240.

3. In favor of the holder of a warrant of a city, drawn by the comptroller, where there is doubt whether the person is entitled to the

money, there being another claimant, who has sued the city therefor, and the mayor refuses to sign the warrant. *People* v. *Booth*, 49 Barb. 31; 32 How. (N. Y.) 17.

§ 10. **County and town officers.** Where a county treasurer has no money in his hands with which to pay claims against the county, and it is not within his power or duty as treasurer to provide them, a mandamus should not issue to compel payment. *People* v. *Edmonds*, 19 Barb. 472; Moses on Mand. 99.

So, a mandamus will not lie to compel a county auditor to draw an order on the county treasurer, where he has not the authority to fix the amount, unless such amount has been ascertained and liquidated by the proper authority. *Commissioners* v. *Auditor*, 1 Ohio St. 322. So, a mandamus was refused to compel the clerk of a school district to amend his records, where it appeared he had ceased to be clerk, and had removed without the jurisdiction of the court. *Mason* v. *Dist. No.* 14, 20 Vt. 487.

As the granting of the writ depends to some extent upon the discretion of the court, it would appear proper for the court to look into the facts returned, and if it should appear that the collector against whom the mandamus was sought would have no authority to collect the same, the court should refuse to issue the process. *Waldron* v. *Lee*, 5 Pick. 333.

§ 11. **Private corporations.** This extraordinary legal remedy will not be allowed in favor of or against corporations where there are other general and adequate remedies at law, or where there is a specific remedy provided by statute. *King* v. *Water Works Co.*, 6 Ad. & E. 355; *People* v. *Supervisors, etc.*, 12 Barb. 217; *Tarver* v. *Commissioners*, 17 Ala. 527. Nor will it be granted unless the applicant has a clear right to the performance of the duty, and will be injured by the non-performance (*People* v. *Supervisors*, 64 N. Y. [19 Sick.] 600; *People* v. *Thompson*, 25 Barb. 73; *People* v. *Head*, 25 Ill. 325); nor where the performance of the act is physically impossible (*State* v. *Perine*, 34 N. J. Law, 254; *Silverthorne* v. *Warren, R. Co.*, 33 N. J. 173; *State* v. *Police Jury*, 22 La. Ann. 611); nor to compel the doing of an act prohibited by an injunction (*Railroad Co.* v. *Wyandot Co.*, 7 Ohio St. 278); nor to compel the doing of an unlawful act (*Ross* v. *Lane*, 11 Miss. 695; *Gilespie* v. *Wood*, 4 Humph. [Tenn.] 437); nor where the proceeding would be ineffectual, as to admit a person to a medical society, from which he would be liable to immediate expulsion (*Ex parte Paine*, 1 Hill, 665); nor to prevent an anticipated failure of duty. *State* v. *Carney*, 3 Kans. 88; *State* v. *Dubuclet*, 24 La. Ann. 16.

And in Illinois a mandamus does not lie to compel a railroad company to institute proceedings to condemn lands, whereof they have obtained possession. *Smith* v. *Chicago, etc., R. Co.*, 67 Ill. 191.

§ 12. **Comptrollers, auditors and canvassers.** It has been held that until there was an appropriation for the purpose of paying the salary of a judge, a mandamus would not lie against the auditor of public accounts to pay the same. *Ex parte Tully*, 4 Ark. 220. And a patent for land cannot be set aside or vacated by a mandamus requiring the auditor to issue another patent for the same land. *People* v. *Auditor*, 3 Ill. 567. Nor will a mandamus issue to compel an auditor to enter taxes upon a tax duplicate, until the time arrives when the law requires the duty to be performed. *Zanesville* v. *Auditor*, 5 Ohio St. 589.

And where it appeared that it was the duty of the comptroller to audit, adjust and settle the accounts of all officers, and also to decide upon the justice of all claims against or by the State, and he refused to pay a sheriff certain fees to which he was entitled, and the latter applied for a mandamus, it was held that the duty of the comptroller was not merely ministerial, but discretionary; and that he could not be controlled in the exercise of this discretion by mandamus. *Towle* v. *State*, 3 Fla. 202. So it was held that the comptroller of the city of New York could not be compelled by mandamus to draw his warrant for the payment of charges which were not by law county charges, although audited by the board of supervisors. *People* v. *Haws*, 12 Abb. Pr. 192; 21 How. (N. Y.) 117. And it does not lie against said comptroller to compel the payment of a claim against the corporation, until it is audited by the finance department. *People* v. *Brennan*, 18 Abb. Pr. 100.

As to canvassers, their duties may be both ministerial and judicial, or either. As to merely ministerial acts, as we have noticed, they may by mandamus be required to perform them; but as to their discretionary acts or judicial functions, the proceeding will not lie. Thus, where they are, among other things, empowered to hear and determine all contested elections, their judgment in relation thereto cannot be reviewed by mandamus. *Grier* v. *Shackleford*, 3 Brev. 491; *Mayor of Vicksburgh* v. *Rainwater*, 47 Miss. 547.

The general rule, that courts will not interfere with the exercise of a discretion or final judgment of canvassers, is illustrated by the following cases: *Arberry* v. *Beavers*, 6 Tex. 457; *People* v. *Supervisors*, 12 Barb. 217; *State* v. *Rodman*, 43 Mo. 256; *People* v. *Stevens*, 5 Hill, 616; *State* v. *Commissioners*, 8 Nev. 309.

§ 13. **Miscellaneous.** As we have referred to the nature and character of the remedy by mandamus, and shown when and where it could

not be invoked by parties, it may be proper in conclusion to refer to the mode by which the commands of the writ are enforced. This is by an attachment for the contempt of the court from which the writ issues. The practice is the same as in other cases of contempt. *People* v. *Pearson*, 3 Ill. 270. But the practice in such cases is frequently, in not generally, the subject of statutory regulation in the various States.

CHAPTER XCIII.

MANDATE.

TITLE I.

OF MANDATES IN GENERAL.

ARTICLE I.

WHAT A MANDATE IS, AND THE RIGHTS AND DUTIES OF THE PARTIES.

Section 1. Definition. A mandate is when one undertakes, without recompense, to do some act for another in respect to the thing bailed. 2 Kent's Com. 568. See, also, *Eddy* v. *Livingston*, 35 Mo. 487. Or, as defined by Story, it is a bailment of personal property, in regard to which the bailee engages to do some act without reward. Story on Bailm., § 137. In the case of a *deposit*, the principal object of the parties is the custody of the thing, and the service and labor are merely occasional; in the case of a *mandate*, the labor and services are the principal objects of the parties, and the thing is merely accessorial. Id., § 140. The person employing is the *mandator* and the person employed is the *mandatary*. And a familiar illustration of a mandate is, the undertaking by a party to receive money and deliver it to another without reward. *McNabb* v. *Lockhart*, 18 Ga. 495; *Skelley* v. *Kahn*, 17 Ill. 170.

§ 2. **Nature of the contract.** A mandate may be made either by express or implied assent. Thus, if money is bailed to a man upon the faith of a promise made by him to take and deliver it to a banker, or to invest it in the public funds, or to lay it out in the purchase of lands, this is an *express* mandate. If a person takes charge of living animals, or perishable chattels, for whose preservation and safe-keeping a certain amount of work and labor, skill and attention is necessarily requisite, and which such person, by accepting the trust, impliedly undertakes to furnish, this is an *implied* mandate. But so long as there has been no actual bailment by the delivery and acceptance of the chattel, there is no binding contract of mandate, either express or implied. 1 Wait's

Law & Pr. 314. It is not, however, necessary, in every case, in order to charge a mandatary with an article lost, that the delivery should have been made to him individually, or to one expressly or specifically authorized to receive for him; but an agency to receive may be implied in the same manner as such agency may be implied in relation to articles which were to be carried for hire. *Lloyd* v. *Barden*, 3 Strobh. (S. C.) 343.

§ 3. **Duties of mandatary.** The general principle of the civil law is that, although a bailee is at liberty to reject a mandate, yet, if he chooses to accept it, he is bound to perform it according to his engagement; and if he fails so to do, he will be liable for all damages sustained by the mandator by his neglect, in like manner as he would be liable for any misfeasance. Story on Bailm., § 164. This was likewise considered by Sir William Jones to be the rule of the English law. See Jones on Bailm. 53, 120. But it may now be regarded as well settled that, by the common law, a mandatary, or one who undertakes to do an act for another, without reward, is not answerable for omitting to do the act, and is only responsible when he attempts to do it, and does it amiss. In other words, he is responsible for a *misfeasance*, but not for a *nonfeasance*, even though special damages are averred. *Coggs* v. *Bernard*, 2 Ld. Raym 909; *Elsee* v. *Gatward*, 5 Term R. 143; *Thorne* v. *Deas*, 4 Johns. 84; *Balfe* v. *West*, 13 C. B. 466; S. C., 22 Eng. Law & Eq. 506; *M'Gee* v. *Bast*, 6 J. J. Marsh. (Ky.) 455; *Ainsworth* v. *Backus*, 5 Hun (N. Y.), 414. The common law leaves him to act or not to act as he may think fit; he may, therefore, refuse to accept the chattel when it is tendered to him, and no action can be maintained against him for so doing. But if he takes it and carries it away, he then acts, he has commenced the work, and he is responsible for any subsequent misfeasance. Id.; *Whitehead* v. *Greetham*, 2 Bing. 464; *Shillibeer* v. *Glyn*, 2 Mees. & W. 143. Thus, where a sum of money was bailed to a party upon the faith of an undertaking made by him to cause the sum to be paid to the bailor or his order at a distant place, it was held that the bailment of the money was a sufficient consideration for the undertaking, and that the mandatary was responsible for the nonfulfillment of his engagement. Id. See, also, *Jenkins* v. *Motlow*, 1 Sneed, 248; *Bland* v. *Womack*, 2 Murph. 373. So, where certain iron boilers were delivered to a man upon the faith of an undertaking made by him to weigh them gratuitously and return them to the bailor in as perfect and complete a condition as they were in at the time of making the bailment and the promise, and the mandatary took the boilers to pieces in order to weigh them, but refused to put them together again, it was held that he was responsible for his

breach of contract, and that he must make good the damage which had been sustained by the mandator. *Bainbridge* v. *Firmstone*, 8 Ad. & El. 743. So, where the defendant undertook, voluntarily and without consideration, to get a policy of insurance renewed on account of the plaintiff, but did it so negligently that no benefit was derived from it, the action against him was allowed to proceed. *Wilkinson* v. *Coverdale*, 1 Esp. 75. See, also, *Ferguson* v. *Porter*, 3 Fla. 27, 38; *French* v. *Reed*, 6 Binn. (Penn.) 308; *Ainsworth* v. *Backus*, 5 Hun (N. Y.), 414.

As it regards the mere custody of the thing bailed, the mandatary stands in the position and is clothed only with the ordinary liabilities of a naked depositary. *Beardslee* v. *Richardson*, 11 Wend. 25. And see Vol. 2, tit. *Deposit*. He is bound only to slight diligence and is responsible only for gross neglect. One who has undertaken gratuitously to convey money or goods from one place to another, and has entered upon the trust by accepting possession of the money or the goods, is bound to exercise the same care and diligence in the execution of the task that a person of ordinary care and prudence might be expected to exercise in the conveyance of his own property. If, by negligence and mismanagement in the accomplishment of his undertaking, the money or the goods are lost or stolen, injured or spoiled, he will be responsible for the loss. *Colyar* v. *Taylor*, 1 Coldw. (Tenn.) 372; *Tracy* v. *Wood*, 3 Mas. (C. C.) 132; *Lampley* v. *Scott*, 24 Miss. 528; *Rey* v. *Toney*, 24 Mo. 600; *Sodowsky* v. *M'Farland*, 3 Dana (Ky.), 205; *First Nat. Bk. of Carlisle* v. *Graham*, 79 Penn. St. 106; S. C., 21 Am. Rep. 49. But he will not be held responsible for the loss of the money or goods if he is forcibly robbed without any default on his part. *Walker* v. *British Guarantee Association*, 18 Ad. & Ell. (N. S.) 277.

If a chattel is bailed to a workman or artificer in some particular art, craft, or profession, upon the faith of an undertaking by the bailee to mend, repair, or improve it gratuitously for the benefit of the mandator, the mandatary must complete the work within a reasonable period, and must be especially mindful that the article is not injured in his hands during the performance of his work, through a want of that knowledge and skill which every workman and artificer in that particular art or craft is bound to possess. The situation and profession of the artisan in such a case naturally imply that he is possessed of competent skill, and he is responsible for injuries resulting from his neglect to use it, whether he is or is not to be paid for his labor and pains. The foundation of this increased liability is the increased confidence reposed in him, which induced the mandator to trust him with the chattel when he would not have trusted it to an unskillful person. See *Shiells* v. *Blackburne*, 1 H. Bl. 158; *Percy* v. *Millaudon*, 20 Mart.

(La.) 75; *Tompkins* v. *Saltmarsh*, 14 Serg. & R. 275; 1 Wait's Law & Pr. 316. But if a person, known to be unskilled in the particular work or employment he gratuitously undertakes, does the work, at the solicitation of a friend, with such ability as he possesses, he stands excused, although it is unskillfully done; for it is the mandator's own folly to trust him, and the party engages for no more than a reasonable exertion of his capacity. Id.

If the subject-matter of the bailment consists of living animals, the mandatary is bound to furnish them with suitable food and nourishment, and generally to provide them with all such things as are essential to the preservation of their health, and his neglect so to do will amount to a positive fraud and breach of trust. *Harter* v. *Blanchard*, 64 Barb. 617. So, if he negligently permits them to stray away, and they are lost, he is responsible for the loss. See *Rey* v. *Toney*, 24 Mo. 600. And it has been held to be an act of negligence, sufficient to render a gratuitous bailee responsible, for him to have turned a horse after dark into a dangerous pasture to which he was unaccustomed, and by which means the loss of the horse ensued. *Rooth* v. *Wilson*, 1 B. & Ald. 59; 2 Kent's Com. 572. So, if, while the horse is in the bailee's custody, his leg becomes broken, and the bailor resides at a distance, the bailee is bound in the exercise of ordinary care, to provide for the animal's keeping, care and cure, as he would if the animal were his own, and he would be guilty of gross neglect, were he to omit making such provision. *Harter* v. *Blanchard*, 64 Barb. 617.

What is, and what is not gross negligence, amounting to a breach of trust, is often a mixed question of law and fact, but more generally a pure question of fact, to be determined by a jury. See 1 Wait's Law & Pr. 317; *Kirtland* v. *Montgomery*, 1 Swan (Tenn.), 452; *Doorman* v. *Jenkins*, 2 Ad. & El. 256; S. C., 4 Nev. & M. 170. In an action against a mandatary for the loss of property bailed to him, his concomitant acts and declarations, immediately before and after the loss, are admissible in evidence to disprove his negligenee. But it is otherwise of his own testimony. *Tompkins* v. *Saltmarsh*, 14 Serg. & R. 275. And the general rule, that a mandatary is responsible for gross negligence only, is applied solely to cases where he is in the actual performance of some act or duty intrusted to him in regard to the property. If he violates his trust by a misuser of the property, or does any other act inconsistent with his contract, or in fraud of it, he will clearly be liable for all losses and injuries resulting therefrom. Story on Bailm., § 188. And see *Catlin* v. *Bell*, 4 Camp. 183; *Ulmer* v. *Ulmer*, 2 Nott & McC. (S. C.) 489.

§ 4. **Rights of mandatary.** It is of the very essence of the contract of mandate that it be gratuitous. *Lafourche Navigation Co.* v. *Collins*, 12 La. Ann. 119. But if the mandator contemplates any thing to be done on his goods by which the mandatary must or may incur expenses, he is bound to reimburse him. Story on Bailm., §§ 154, 197. And see *Harter* v. *Blanchard*, 64 Barb. 617. If, however, the expenses are unnecessary or extravagant, or arise from the gross negligence or fraud of the mandatary, or from his exceeding his authority, they are not reimbursable. Id.; *Pelletier* v. *Roumage*, 2 La. 529.

In general, a mandatary cannot be said to have any special property in the thing bailed to him, but only a possessory interest, unless he has incurred expenses about it, for which he has a lien. He has, however, a right of action flowing from his possessory title, for any tort done to the thing while in his possession, especially if he is liable over to the mandator in such a case. See *Steamboat Company* v. *Atkins*, 22 Penn. St. 522; *Kellogg* v. *Sweeney*, 1 Lans. (N. Y.) 403; *Nicolls* v. *Bastard*, 2 Cr. M. & R. 659; *Sickles* v. *Gould*, 51 How. (N. Y.) 22; Story on Bailm., § 93, *f*. Vol. 2, tit. *Deposit*.

The general responsibility of the mandatary may be varied by a special contract of the parties. See Vol. 2, 521, 522. But a mandatary cannot, any more than any other bailee, stipulate for an exemption of liability for his own fraudulent acts or omissions. Story on Bailm., § 182, *a*.

§ 5. **Determination of mandate.** The contract of mandate may be dissolved in a variety of ways, as by the death of the mandatary or of the mandator; or by a change of the state of the parties, as, if either party, being a female, marries before the execution of the mandate; or if either party becomes insane, or *non compos mentis*, or is put under guardianship. So, the contract may cease by a revocation of the authority, either by operation of law, or by the act of the mandator. Story on Bailm., §§ 206, 207.

And, at common law, the contract may be dissolved by the renunciation of the mandatary, at any time before he has entered upon its execution. See *ante*, 385, § 2.

CHAPTER XCIV.

MASTER AND SERVANT.

TITLE I.

GENERAL PRINCIPLES RELATING TO MASTER AND SERVANT.

ARTICLE I.

THE RELATION, HOW CONSTITUTED AND DETERMINED.

Section 1. Definition of the relation. The relation of master and servant has its foundation in convenience, whereby a man is directed to call in the assistance of others, where his own skill and labor will not be sufficient to answer the cares incumbent upon him. 1 Broom & Had. Com. (Wait's ed.) 327. In the complicated intercourse of modern society, a great proportion of the business of human life must be carried on through the instrumentality of others; and since slavery does not now exist, either in England or in this country, it seems to follow inevitably, not only that the relationship of master and servant must exist, but also that it must exist by virtue of some agreement, either express or implied, between the parties. See *Metzner* v. *Bolton*, 9 Exch. 518; *Fawcett* v. *Cash*, 5 B. & Ad. 904; 3 Nev. & M. 177; *Hoxie* v. *Lincoln*, 25 Vt. 206; *Derocher* v. *Continental Mills*, 58 Me. 217; S. C., 4 Am. Rep. 286. At the common law, servants were divided into several classes or grades, as menial servants or domestics, apprentices, laborers stewards, factors, bailiffs, etc. See 1 Broom & Had. Com. (Wait's ed.) 329–335. In England, this classification is still maintained, and the relation of master and servant, as it respects each class or grade, is subject to rules or regulations peculiar to itself. See Id. The term "servants" has sometimes been construed in a restricted sense, and held to embrace those only who, in common parlance, are called servants; that is, hirelings, who make a part of a man's family, employed for money, to assist in the economy of the family, or in matters connected within. *Ex parte Meason*, 5 Binn. (Penn.) 167; *Boniface*

v. *Scott*, 3 Serg. & R. 352; *Burgess* v. *Carpenter*, 2 S. C. 7; S. C., 16 Am. Rep. 643. And, in England, it has been repeatedly held that, where legacies are left to the testator's *servants*, none are entitled to such legacies except those properly embraced in the class of menial or domestic servants. See *Townshend* v. *Windham*, 2 Vern. 546; *Herbert* v. *Reid*, 16 Ves. 481; *Ogle* v. *Morgan*, 10 Eng. Law & Eq. 92; *Booth* v. *Dean*, 1 Myl. & K. 560; *Darlow* v. *Edwards*, 1 Hurlst. & C. 547; S. C., 9 Jur. (N. S.) 336. In this country, the word *servant* is one of wide legal import, being indiscriminately applied to all persons of whatever rank or position, who are in the employ, and subject to the direction or control of another. See *Haskins* v. *Royster*, 70 N. C. 601; S. C., 16 Am. Rep. 780; *Jeter* v. *Blocker*, 43 Ga. 331; *Daniel* v. *Swearengen*, 6 S. C., 297; *Walker* v. *Cronin*, 107 Mass. 555.

A person may be the general servant of one, and the special servant of another; that is, he may perform special services for one while he is the general servant of another, and while performing such special service he will, as to that particular service, be the servant of the one for whom such services are performed. *Vary* v. *B., C. R. & M. R. Co.*, 42 Iowa, 246.

§ 2. **Of master and apprentice.** Among persons coming within the legal description of servants are usually included apprentices, who are bound to service for a term of years, to learn some art or trade. By the common law, persons of full age may bind themselves apprentices. 4 Com. Dig. 94. And in contracts between persons of full age, a master and a person willing to be instructed in the character of apprentice, the agreement is to be carried into effect as all other contracts, according to the stipulation of the parties. *Commonwealth* v. *Sturgeon*, 2 Brown (Penn), 208. The relation generally arises, however, between minors and adults, in which case it is held that the minor is not bound, unless his father or guardian joins in the execution of the indenture. *Blunt* v. *Melcher*, 2 Mass. 228; *Peters* v. *Lord*, 18 Conn. 337; *Guthrie* v. *Murphy*, 4 Watts (Penn.), 80; *Handy* v. *Brown*, 1 Cranch (C. C.), 610; *Lobdell* v. *Allen*, 9 Gray, 377; *Phelps* v. *Culver*, 6 Vt. 430; *Cuming* v. *Hill*, 3 B. & Ald. 59; *Commonwealth* v. *Atkinson*, 8 Phil. (Penn.) 375. See *ante*, Vol. 3, 578, *Hire of Services*. But see *Woodruff* v. *Logan*, 6 Ark. 276; *Wood* v. *Fenwick*, 10 Mees. & W. 195. Nor can a minor be bound as an apprentice at common law for any purpose, except to learn some lawful trade, business, or occupation. Indentures of apprenticeship to *serve generally* cannot, therefore, be supported. *Respublica* v. *Keppele*, 2 Dall. (Penn.) 197. And see *United States* v. *Bainbridge*, 1 Mas. (C. C.) 71. And a master who takes an apprentice, for the purpose of instructing him in any par-

ticular art or trade, has no right to require services from him as a menial or house servant. *Commonwealth* v. *Hemperly*, 3 Penn. Law Jour. Rep. 49.

The contract of an infant with an apprentice is so far binding upon him as to be operative, unless he avoids it. *The King* v. *Inhabitants of St. Petrox*, 4 T. R. 196. But the binding of an apprentice to a married woman at common law is void. *Rex* v. *Guildford*, 2 Chit. 284. So, it is an established rule of the English and American law, that the relation of master and apprentice cannot be created, and the corresponding rights and duties of the parent transferred to a master, except by deed. *King* v. *Inhabitants of Bow*, 4 Maule & Selw. 383; *Commonwealth* v. *Wilbank*, 10 Serg. & R. 416; *Squires* v. *Whipple*, 2 Vt. 111; *Peters* v. *Lord*, 18 Conn. 337. Nor is an apprentice bound by indentures unless he is himself a party thereto. *Balch* v. *Smith*, 12 N. H. 437; *Matter of McDowle*, 8 Johns. 328; *Pierce* v. *Massenburg*, 4 Leigh (Va.), 493; *Hudson* v. *Worden*, 39 Vt. 382; *Rex* v. *Ripon*, 9 East, 295. And his assent must be distinctly expressed in the indenture. *Harper* v. *Gilbert*, 5 Cush. 417. And he is not liable for a breach of the covenants of the indentures, although he executes them with his father or guardian, but the father or guardian alone is liable thereon. *Whitley* v. *Loftus*, 8 Mod. 191; *Harney* v. *Owen*, 4 Blackf. (Ind.) 337; *Hiatt* v. *Gilmer*, 6 Ired. (N. C.) 450. Thus, a father may covenant that his son shall serve for a certain term, yet the son may serve or not at his option, and if he does not serve, the father is liable upon his covenants as much as though he had the power to enforce the service. *Cuming* v. *Hill*, 3 Barn. & Ald. 59. Where the father joins with the infant in the indentures, the master has his remedies against third persons for enticement, on the principles usually applicable to servants. *Cox* v. *Muncey*, 6 C. B. (N. S.) 375. See *post*, 407, art. 4, § 2.

It has been questioned whether an indented apprentice can be assigned by one master to another; and in one case it was concluded that such an assignment might be good, by way of covenant between the masters, though not as an assignment to pass an interest in the apprentice. *Nickerson* v. *Howard*, 19 Johns. 113. See *Hayes* v. *Willio*, 4 Daly (N. Y.), 259. But the better doctrine is that an apprenticeship cannot be assigned, the master having a mere personal trust. *Davis* v. *Coburn*, 8 Mass. 299; *Haley* v. *Taylor*, 3 Dana, 222; *Campbell* v. *Cooper*, 34 N. H. 49; *Tucker* v. *Magee*, 18 Ala. 99. And a note given for the assignment of the time of an apprentice is held to be without consideration, and void. *Walker* v. *Johnson*, 2 Cranch (C. C.), 203. And although the apprentice consents to the transfer, he is not bound

thereby, but may avoid the same at his option. *Baxter* v. *Burfield*, 2 Strange, 1266. See *Page* v. *Marsh*, 36 N. H. 305.

The master is under an obligation to instruct the apprentice in the mysteries of the trade or business to which he is bound. *Rex* v. *Peck*, Salk. 66. And he must treat the apprentice in a humane manner. *McGrath* v. *Herndon*, 4 T. B. Monr. 480. And he will be held liable for any abuse of his authority to correct the apprentice for negligence or misbehavior. *King* v. *Keller*, 2 Show. 289; *Commonwealth* v. *Baird*, 1 Ashm. (Penn.) 267. But in order to render the master liable on his covenant to teach a trade, it must appear that the apprentice was ready and willing to be taught (*Raymond* v. *Minton*, L. R., 1 Exch. 244), and that he was competent to learn the trade. *Philips* v. *Clift*, 4 H. & N. 168; *Wright* v. *Brown*, 5 Md. 37.

Where the mode in which the apprentice shall be bound is prescribed by statute, a full compliance with the provisions of the statute is required. The authority to take minor children from their parents, and bind them to strangers, as servants, being in derogation of natural right, must be strictly construed, and exercised in exact conformity to the powers given and the rules prescribed. Nothing is to be presumed in aid of such authority, but every thing which is required for its support must be affirmatively shown. *Reidell* v. *Morse*, 19 Pick. 358. And see *Howry* v. *Calloway*, 48 Miss. 587; *Whitmore* v. *Whitcomb*, 43 Me. 458; *Rumney* v. *Ellsworth*, 4 N. H. 139. In some of the States defective indentures are held to be absolutely void (*Chaudet* v. *Stone*, 4 Bush [Ky.], 210; *Guthrie* v. *Murphy*, 4 Watts, 80; *Austin* v. *McCluney*, 5 Strobh. [S. C.] 104; *Butler* v. *Hubbard*, 5 Pick. 250), while in other States they are not deemed void, but voidable only. *Luby* v. *Cox*, 2 Harr. (Del.) 184; *Fowler* v. *Hollenbeck*, 9 Barb. 309. See *People* v. *Weissenbach*, 60 N. Y. (15 Sick.) 385. But in either case, the apprentice may remain with, or leave the master at his option. *People* v. *Pillow*, 6 N. Y. Leg. Obs. 106; S. C., 1 Sandf. 672; *Fowler* v. *Hollenbeck*, 9 Barb. 309. And see *Ford* v. *McVay*, 55 Ill. 119; *Doane* v. *Covel*, 56 Me. 527.

An indenture, signed by the minor and not by his parent or guardian, is held to be void. *Guthrie* v. *Murphy*, 4 Watts, 80. So, of an indenture signed by the father only, and not by the apprentice. *Ivins* v. *Norcross*, 3 N. J. Law (2 Penn.), 977. Indentures have likewise been declared void for not specifying, as the statute required, some "profession, trade or employment" in which the apprentice was to be instructed. *In re Goodenough*, 19 Wis. 274. See, also, *People* v. *Hoster*, 14 Abb. Pr. (N. S.) 414; *Burnham* v. *Chapman*, 17 Me. 385. And where the statute requires the indentures to be sealed, a writing without seal

is not an indenture, nor binding as such. *Nickerson* v. *Easton*, 12 Pick. 110; *Dowd* v. *Davis*, 4 Dev. (N. C.) L. 61; *Com.* v. *Wilbank*, 10 Serg. & R. 416. So, if the overseers of the poor or other officers bind an apprentice as a pauper, when he is not in fact so, the articles are void. *Reidell* v. *Morse*, 19 Pick. 358. See, also, *Comas* v. *Reddish*, 35 Ga. 236. And if the statute requires the indentures to be approved by a certain court or officer, a neglect to comply with this requisition is fatal to the validity of the indentures. *Morrill* v. *Kennedy*, 22 Ark. 324. So if the statute requires indentures to be sealed, acknowledged and recorded, a failure in any of these respects renders the indentures invalid. *Bolton* v. *Miller*, 6 Ind. 262.

But an indenture of apprenticeship, containing covenants on the part of the master which are not prescribed by the statute, is not thereby rendered void, unless they were inserted by fraud or mistake. *Cochran* v. *Davis*, 5 Litt. (Ky.) 118.

The respective rights, obligations and duties of master and apprentice will more fully appear in subsequent articles.

§ 3. **Of master and hired servant.** The strictly legal relation of master and servant rests wholly upon contract. The one is bound to render the service, and the other to pay the stipulated consideration. See 2 Kent's Com. 258. As a general rule, every person of the full age of twenty-one years, and not under any legal disability, is capable of becoming either a master or a servant. But, in order that a contract of hiring and service may be legally binding, it is necessary that at the time such a contract is entered into, the party about to be hired should be free from any other engagement incompatible with that into which he is about to enter, or, in other words, he must be *sui juris*. See *Rex* v. *Dunton*, 15 East, 352; *Rex* v. *Beaulieu*, 3 M. & S. 229; *Hoxie* v. *Lincoln*, 25 Vt. 206; *Grove* v. *Hodges*, 55 Penn. St. 504; *Tewksbury* v. *O'Connell*, 21 Cal. 60. As to the parties not competent to enter into the contract, see *ante*, Vol. 3, 578, *Hire of Services*, § 1.

§ 4. **Of contracts of hiring.** By the common law, a servant might be hired either by deed or by a parol contract, the only distinction being, that when he was hired by deed, he could only be discharged from the service by an equally formal instrument, but when the hiring was by parol, he might also be discharged by parol. Smith on Master and Servant, 16; *Rex* v. *Daniel*, 6 Mod. 182.

In England, if no time is limited either expressly or by implication, for the duration of a contract of hiring and service, the hiring is considered as a general hiring, and, in point of law, a hiring for a year. *Foxall* v. *International Land Credit Company*, 16 L. T. (N. S.) 637; *Lilley* v. *Elwin*, 11 Q. B. 742; *Fawcett* v. *Cash*, 3 Nev. & M. 177;

S. C., 5 B. & Ad. 904. And this rule is held to be applicable to all contracts of hiring and service, whether written or unwritten, whether express or implied, and whatever may be the nature of the service. Id.; *Huttman* v. *Boulnois*, 2 Car. & P. 511; *Rex* v. *Worfield*, 5 T. R. 506; *Beeston* v. *Collyer*, 2 Car. & P. 607; S. C., 4 Bing. 309; *Davis* v. *Marshall*, 4 L. T. (N. S.) 216. The rule is not, however, an inflexible one, and does not apply where the contract contains stipulations inconsistent with the application of it, or where, from some well-known custom upon the subject, the parties may be considered to have contracted with reference to such custom, and thus to have excluded its application. *Evans* v. *Roe*, L. R., 7 C. P. 138; 2 Eng. Rep. 116; *Baxter* v. *Nurse*, 6 Man. & G. 935. Nor does the rule apply to cases in which there has been a service, but no contract of hiring, and no circumstances from which a contract can be implied. See *Beeston* v. *Collyer*, 4 Bing. 313; *Bayley* v. *Rimell*, 1 Mees. & W. 506. And a contract of hiring cannot be presumed where the circumstances tend rather to rebut such a presumption, as where paupers have been taken to live with their relatives, or others, out of charity (*Rex* v. *Rickinghall*, 7 East, 373; *Rex* v. *Sow*, 1 B. & Ald. 178); or where the agreement was for cohabitation, and not for service. *Rex* v. *Northwingfield*, 1 B. & Ad. 912; *Bradshaw* v. *Hayward*, Car. & M. 591; Smith on Mast. & Serv. 42. If either party is at liberty to determine the service at any time without notice, the hiring cannot be considered a yearly hiring (*Rex* v. *Great Bowden*, 7 B. & C. 249); so, if the hiring be expressly for less than a year, although done purposely to avoid the consequences of a yearly hiring (*Rex* v. *Coggeshall*, 6 M. & S. 264; *Rex* v. *Mursley*, 1 T. R. 694); and so, if the master does not have the entire control over the servant for the whole time, as, if he is at liberty to work for other people when not engaged for his master (*Rex* v. *Killingholme*, 10 B. & C. 802; *Reg.* v. *Ravenstonedale*, 12 Ad. & El. 73); and the same principle is applicable when the number of hours the servant shall work is limited by contract, by custom or by positive statute. *Rex* v. *Edgmond*, 3 B. & Ald. 107; *Reg.* v. *Northowram*, 9 Q. B. 24. So, if certain portions of the year are specially excepted (*Rex* v. *Arlington*, 1 M. & S. 622; *Rex* v. *St. Helens Auckland*, 4 B. & Ad. 718, 726); or even if the servant is to have no pay Sundays (*Rex* v. *North Nibley*, 5 T. R. 21; *Rex* v. *Kingswinford*, 4 id. 219; *Rex* v. *Cowpen*, 5 Ad. & El. 333); or holidays (*Reg.* v. *Threkingham*, 7 id. 866), the hiring cannot be considered a hiring for a year. Id. So, if the agreement be to do work by the piece or job, it is not a yearly hiring. *Rex* v. *Woodhurst*, 1 B. & Ald. 325. But if the hiring be for a year, a mere stipulation for payment by piece-

work will not render it less a yearly hiring. *Kings' Norton* v. *Camden*, 2 Strange, 1139; Smith on Mast. & Serv. 44.

In this country a general or indefinite hiring is *prima facie* a hiring at will. *De Briar* v. *Minturn*, 1 Cal. 450; *Tatterson* v. *Suffolk Manuf. Co.*, 106 Mass. 56; *Prentiss* v. *Ledyard*, 28 Wis. 131; *Franklin Mining Co.* v. *Harris*, 24 Mich. 115. But it has been held that a contract for hiring at so much per month will readily be presumed a hiring by the month, even if nothing was said as to the term of service. *Beach* v. *Mullin*, 34 N. J. Law, 343. And a general engagement of a servant "at a salary of fifteen hundred dollars a year, payable weekly," unaffected by any other considerations growing out of the custom of the place, the conduct of the parties or other extraneous evidence disclosing a contrary intention, was held to constitute a contract of hiring for the year. *Bleeker* v. *Johnson*, 51 How. (N. Y.) 380. See *ante*, Vol. 3, 579, title *Hire of Services*, § 2.

§ 5. **The statute of frauds.** As to the effect of the statute of frauds upon contracts for service, see *ante*, Vol. 3, 593, title *Hire of Services*, § 8.

§ 6. **Illegality of contract.** See title *Hire of Services*, §§ 5, 6, Vol. 3, 586, 589. In some cases, professional men, manufacturers or tradesmen, on taking clerks, apprentices or workmen into their employ, require them to enter into an agreement, that they will not, on leaving their service, carry on a profession, manufacture or trade, similar to their own, within certain limits. All agreements of this character in *general* restraint of trade are illegal and void, and cannot be enforced either at law or in equity; and it makes no difference whether they are under seal or not, or whether they are made with or without consideration. They are void as being contrary to public policy. *Mitchell* v. *Reynolds*, 10 Mod. 130; S. C., 1 P. Wms. 181; *Green* v. *Price*, 13 M. & W. 695; *Duffey* v. *Shockey*, 11 Ind. 71; *Gilman* v. *Dwight*, 13 Gray, 356. Reasonable agreements in *partial* restraint of trade have, however, always been held to be valid. *Lange* v. *Werk*, 2 Ohio St. 519; *Wright* v. *Ryder*, 36 Cal. 342; *Brewer* v. *Marshall*, 4 Green's Ch. (N. J.) 537. But there must be some consideration; and without a consideration such an agreement, if under seal, would be unreasonable (*Mallan* v. *May*, 11 M. & W. 665); and if not under seal would be *nudum pactum*. *Hitchcock* v. *Coker*, 6 Ad. & E. 438. The adequacy of the consideration will not, however, be inquired into. Id.; *Moss* v. *Hall*, 5 Exch. 49; *Sainter* v. *Ferguson*, 7 C. B. 716.

As to how far agreements made by workmen to work for a particular master for a long period at certain wages, and no one else, are illegal as being in restraint of trade, where there is no corre-

sponding obligation on the part of the master to find work, see *Hartley* v. *Cummings*, 5 C. B. 247; *Pilkington* v. *Scott*, 15 M. & W. 657; 1 Sm. Lead. Cas. 521. A contract to serve another during life is valid at common law. *Wallis* v. *Day*, 2 M. & W. 277. But such a contract, being contrary to the spirit of our institutions and laws, would scarcely be enforced in this country. And, in Massachusetts, a contract made by an adult with a citizen of the United States, to serve him, "his executors and assigns," for five years, without fixing the nature and extent of the services, or the place of their performance, in consideration of ten dollars, and of being fed, clothed and lodged, and at the expiration of the contract, being paid "the customary freedom dues," was held to be illegal and void, even if valid where it was made. *Parsons* v. *Trask*, 7 Gray, 473.

§ 7. **Of service and agency.** The term "master and servant" is frequently used as the equivalent of the term "principal and agent," the one usually being as accurate as the other. See *Chicago, etc., R. R. Co.* v. *McCarthy*, 20 Ill. 385; *City of Cincinnati* v. *Stone*, 5 Ohio St. 38; *Corbin* v. *American Mills*, 27 Conn. 274. See *ante*, Vol. 1, *Agency*.

§ 8. **Of the termination of the service.** The grounds upon which the discharge of a servant may be justified are briefly stated to be, *First*, willful disobedience on the part of the servant of any lawful order of his master; *second*, grossly immoral misconduct; *third*, habitual negligence in business, or conduct calculated seriously to injure his master's business. Smith's Mast. & Serv. 70. And see *ante*, Vol. 3, 600, title *Hire of Services*, § 13, where the cases on this branch of the subject are fully collected.

If a servant, without his master's consent, engage in any employment or business for himself or another, which may tend to injure the master's trade or business, he may lawfully be discharged before the expiration of the agreed time of service, even though he may so conduct such other business by agents or otherwise, that it does not interfere with the time and attention due the business of his employer. *Dieringer* v. *Meyer*, 42 Wis. 311.

Misconduct such as would authorize a master to discharge an ordinary servant will not discharge the master of an apprentice from his liability on his contract. He takes the apprentice for better or for worse, and he is not justified in discharging him for misconduct or inefficiency. *Winstone* v. *Linn*, 1 B. & C. 460; *Wise* v. *Wilson*, 1 C. & K. 662; *Mercer* v. *Whall*, 5 Q. B. 447; *Wright* v. *Brown*, 5 Md. 37; *Barger* v. *Caldwell*, 2 Dana (Ky.), 131. Even the theft of the master's money or goods is not sufficient to warrant the master in dis-

charging. *Shepherd* v. *Maidstone*, 10 Mod. 144; *Powers* v. *Ware*, 2 Pick. 451. Nor will the incurable sickness of the apprentice discharge the master from his covenants. *Rex* v. *Inhabitants of Hales Owen*, 1 Str. 99. So, an apprentice is justified in leaving a master guilty of cruel and inhuman treatment (*McGrath* v. *Herndon*, 4 T. B. Mour. [Ky.] 480), or if the master's conduct is so immoral as to render it improper for the apprentice to remain with him. *Warner* v. *Smith*, 8 Conn. 14; *Commonwealth* v. *St. German*, 1 Browne (Penn.), 24. And the courts will discharge an apprentice upon his application for the gross misconduct of the master. Id.; *Berry* v. *Wallace*, Wright (Ohio), 657. And if a fee has been paid to the master, the court may order a return of such a proportion thereof as the unexpired term bears to the term expired. *Stewart* v. *Davis*, 11 Ir. Com. Law Rep. 34.

Apprenticeship is determined by the death of the master. *Baxter* v. *Burfield*, 2 Str. 1266. So, it may be dissolved by the mutual agreement of the parties thereto. *Graham* v. *Graham*, 1 Serg. & R. 330; *Nickerson* v. *Easton*, 12 Pick. 110. See *McGunigal* v. *Mong*, 5 Penn. St. 269. But neither party can, without the consent of the others, end the apprenticeship by his own act. *Hiatt* v. *Gilmer*, 6 Ired. (N. C.) 450; *Cuming* v. *Hill*, 3 B. & Ald. 59; *Powers* v. *Ware*, 2 Pick. 451. Thus, the mere abandonment of service by the apprentice does not avoid the apprenticeship. *Gray* v. *Cookson*, 16 East, 13, 27; *Cockran* v. *The State*, 46 Ala. 714. A minor who is bound as an apprentice may, however, upon attaining full age, abandon the master's service, although a portion of the term has not expired. *Walker* v. *Chambers*, 5 Harr. (Del.) 312; *Forsyth* v. *Hastings*, 27 Vt. 646; *Coghlan* v. *Calaghan*, 7 Ir. Com. Law Rep. 291. And where a master grants an apprentice license to depart, he cannot afterward revoke such license, or prosecute his surety on his covenants, for such departure. *Lewis* v. *Wildman*, 1 Day (Conn.), 153. And see *Rex* v. *Notton*, Burr. (S. C.) 629.

Although the fact that the apprentice lacks the capacity to learn the trade does not warrant his discharge, yet it will constitute a good defense to an action against the master for not teaching him. *Barger* v. *Caldwell*, 2 Dana (Ky.), 129; *Clancy* v. *Overman*, 1 Dev. & Bat. 402. A covenant to teach the apprentice a particular trade does not bind the master, in any event, to compel the apprentice to learn his trade, but only to act toward him in the matter of coercion, as an ordinarily prudent and sensible parent would act toward his own child. *Wright* v. *Brown*, 5 Md. 37.

A child held in pursuance of indentures of apprenticeship which are invalid may be discharged upon *habeas corpus*. *Commonwealth*

v. *Atkinson*, 8 Phil. (Penn.) 375; *Cannon* v. *Stuart*, 3 Houst. (Del.) 223.

It is held that the government may dissolve the relation of master and apprentice existing by force of municipal regulations, and the obligation of service resulting from indentures executed under or sanctioned by local law. And the relation is dissolved by the acceptance of the apprentice into the military service of the government, although his enlistment was his voluntary act, not compelled by the government, and without the consent of the master; and the wages due the former for his services in the army, as well as bounty money, belong to him, to the exclusion of any claim thereto by the latter. *Johnson* v. *Dodd*, 56 N. Y. (9 Sick. 76. See, also, *Kelly* v. *Sprout*, 97 Mass. 169.

The master will be discharged from the obligations of the indentures in a proper case, upon application to a court of competent jurisdiction. Thus, a court may discharge an apprentice for misconduct of a serious character, and such as amounts to a breach of the covenant to faithfully serve. See *Sheppherd* v. *Maidstone*, 10 Mod. 144; *Mercer* v. *Whall*, 5 Q. B. 447. Where there are equitable but not legal grounds for relief, or a court of law can furnish no equitable relief, resort may be had to a court of equity, particularly where there is fraud. *Hatcher* v. *Cutts*, 42 Ga. 616; *Webb* v. *England*, 29 Beav. 44; *Cuff* v. *Brown*, 5 Price, 297. Where a statute prescribes the mode for discharge, that remedy must be pursued. See *Moody* v. *Benson*, 4 Harr. (Del.) 115.

§ 9. **Servant does not occupy as tenant.** Where the occupation of a house by a servant is connected with the service, or is required by the employer for the necessary or better performance of the service, the occupation is as servant, not as tenant, and the possession is that of the master. *Bertie* v. *Beaumont*, 16 East, 34; *Reg.* v. *Spurrell*, L. R., 1 Q. B. 72; *Kerrains* v. *People*, 60 N. Y. (15 Sick.) 221; S. C., 19 Am. Rep. 158. In such case, the servant acquires no estate in the premises by the performance of his duties, even though he be permitted to use the premises for carrying on an independent business of his own. *White* v. *Bayley*, 10 C. B. (N. S.) 227. The termination of his service is also the termination of his right to the premises, and if he fails to peaceably surrender the house which he occupied as a servant, the master may forcibly eject him therefrom. *Champion* v. *Hartshorne*, 9 Conn. 564; *DeBriar* v. *Minturn*, 1 Cal. 450; *Rex* v. *Tynemouth*, 12 East, 46; *Haywood* v. *Miller*, 3 Hill, 90. It is, however, held that one of two partners, joint tenants, may authorize a servant to remain in the house where the business is carried on, although the other has given him notice to go. *Donaldson* v. *Williams*, 1 Cr. & M. 345.

ARTICLE II.

OF THE MUTUAL DUTIES AND OBLIGATIONS OF MASTER AND SERVANT.

Section 1. Of the master's discipline. An apprenticeship is an important trust, and includes a due attention to the principles of moral rectitude and proper habits of industry. If the master designedly corrupts and poisons the mind of the apprentice by the infusion of immoral principles, — if he compels him to work on Sunday, or if he withholds from him the means of public worship and religious instruction, — this will constitute sufficient ground for discharging the apprentice from the covenants in the indenture. *Commonwealth* v. *St. German*, 1 Brown (Penn.), 24; *Warner* v. *Smith*, 8 Conn. 14. A master has a right to use moderate corporal correction, in case of an offending apprentice. *Commonwealth* v. *Baird*, 1 Ashm. (Penn.) 267. But this right is denied as it respects ordinary hired servants. Id.; 2 Kent's Com. 261; 1 Broom & Had. Com. (Wait's ed.) 336. The only civil remedies a master has for idleness, disobedience, or other dereliction of duty or breach of contract on the part of a servant, are, either to bring an action against him, or to discharge him from service. Smith's Mast. & Serv. 69. And see *ante*, Vol. 3, 600, title *Hire of Services*, § 13.

§ 2. **Of supplying necessaries to servants.** The master of an apprentice is bound to supply him with necessaries, both in sickness and in health. *King* v. *Hales Owen*, 11 Mod. 278. The master is bound, from the very nature of the relation between master and apprentice, to pay for medical attendance on the apprentice (Id.; *Reg.* v. *Smith*, 8 Car. & P. 153); and the father of the apprentice is only bound where the medical services have been rendered at his instance. *Easley* v. *Craddock*, 4 Rand. (Va.) 423. See *Percival* v. *Nevill*, 1 Nott & McC. (S. C.) 452; *Dunbar* v. *Williams*, 10 Johns. 249. But it may now be regarded as the settled doctrine that a master is not bound to provide medical assistance for an ordinary hired servant, unless he stipulates for it in the contract of hiring. *Wennall* v. *Adney*, 3 B. & P. 247; *Sellen* v. *Norman*, 4 Carr. & P. 80; *Clark* v. *Waterman*, 7 Vt. 76; *Sweet Water Manuf. Co.* v. *Glover*, 29 Ga. 399.

§ 3. **Employment by master.** Where the contract of hiring merely contains an undertaking on the part of the master to pay stipulated wages in proportion to the work done by the servant, there is no implied obligation on the part of the master to find work. *Lees* v. *Whitcomb*, 5 Bing. 34; *Sykes* v. *Dixon*, 9 Ad. & El. 693; *Williamson* v. *Taylor*, 5 Q. B. 175. Still, if the contract of hiring is capable of such

a construction, the courts are disposed to imply an agreement on the part of the master to find work, if that is necessary to enable the servant to earn wages. See *Hartley* v. *Cummings*, 5 C. B. 247; *Pilkington* v. *Scott*, 15 Mees. & W. 657.

And where a person employs another for a definite period, he is bound to provide him with work for the whole period, and he is not at liberty to make a deduction from the wages of the servant for time that he was not at work, when the failure results from his neglect or refusal to provide work. *Cook* v. *Sherwood*, 11 W. R. 595; *Whittle* v. *Frankland*, 2 Best & Sm. 49; *Bromley* v. *School District*, 47 Vt. 381. The master may discontinue the business if he chooses, but he cannot deprive the servant of his full compensation for the term through such discontinuance, or from other like cause. *Elderton* v. *Emmons*, 6 C. B. 160; *Nations* v. *Cudd*, 22 Tex. 550.

§ 4. **Indemnity to servant.** The law implies a contract on the part of the master to indemnify his servant from the consequences of his doing, in obedience to his master's orders, any act pursuant to orders which he was bound to obey, or which might have been either lawful or unlawful, but which the servant was induced by the conduct of his master to believe was lawful. The rule that there can be no contribution between wrong-doers has no application in such cases. *Collins* v. *Evans*, 5 Q. B. 830; Smith's Mast. & Serv. 121. And see *Atkins* v. *Johnson*, 43 Vt. 78; S. C., 5 Am. Rep. 260. But a master is not bound to indemnify his servant from the consequences of an act which is *malum in se*, or which the servant knows to be unlawful, although done by him in obedience to his master's orders, the servant not being bound to obey the orders of the master in such a case. *Southern* v. *How*, Cro. Jac. 471; *Davis* v. *Arledge*, 3 Hill (S. C.), 170. See, also, *Duvergier* v. *Fellows*, 10 B. & C. 826; *Ives* v. *Jones*, 3 Ired. (N. C.) 538; *Horton* v. *Riley*, 11 Mees. & W. 492; *Atkinson* v. *Denby*, 7 H. & N. 935.

§ 5. **Action against master for breach of contract.** For a breach of the contract of hiring by the master the servant has two remedies, both at common law. *First*, he may treat the contract as a continuing one, and sue in damages for the breach thereof; or, *second*, he may treat the contract as rescinded, and immediately sue on the *quantum meruit* for the work actually performed. *Planche* v. *Colburn*, 8 Bing. 14; *Lilley* v. *Elwin*, 11 Q. B. 755; *Moody* v. *Leverich*, 4 Daly (N. Y.), 401; S. C., 14 Abb. (N. S.) 145. See *ante*, Vol. 3, 579, 610, title *Hire of Services*, §§ 15, 16.

§ 6. **Wages, how to be paid.** See title *Hire of Services*, §§ 2, 18. Unless the circumstances under which services of any sort have

been rendered are such as to afford evidence of a contract, either express or implied, on the part of the person served to pay for them, he is not bound to do so, and no wages can be recovered by the servant for such services. *Davies* v. *Davies*, 9 Carr. & P. 87; *Alfred* v. *Fitzjames*, 3 Esp. 3; *Reeve* v. *Reeve*, 1 F. & F. 280; *Munger* v. *Munger*, 33 N. H. 581; *Amey's Appeal*, 49 Penn. St. 126. And the mere existence of a valid contract of hiring and service does not necessarily imply a contract to pay wages. Thus, board, lodging and clothes, together with the opportunity of learning the master's business, or the latter consideration alone, might be a sufficient compensation, especially in the case of the young. *Rex* v. *Shinfield*, 14 East, 541; *Stone* v. *Dennison*, 13 Pick. 1; *Meredith* v. *Crawford*, 34 Ind. 399.

Where a stipulated remuneration has been agreed upon, a servant has no claim of additional remuneration on the mere ground of his performance of additional services. In order to sustain such a claim, he must prove some contract, either express or implied, on the part of the master, to pay him an increased salary for his additional services. *Bell* v. *Drummond*, Peake, 45. See *ante*, Vol. 3, 603, title *Hire of Services*, § 14.

§ 7. **Apportionment, when made.** As to the apportionment of an apprentice fee, see Vol. I, 181; see *ante*, Vol. 3, 605, 610, title *Hire of Services*, §§ 15, 18.

§ 8. **Of performance by servant.** See *ante*, Vol. 3, 605, title *Hire of Services*, § 15.

§ 9. **Of giving servant a character.** In the absence of a specific agreement to that effect, there is no legal obligation binding a person who has retained another as a servant to give that person any character at all on dismissal, and no action will lie against him for refusing so to do. *Carrol* v. *Bird*, 3 Esp. 201. And, where a master does give a discharged servant a character, what he says or writes upon the subject is, in general, looked upon as a privileged communication, and no action can be maintained by the servant against him on account of it, if done *bona fide*, and without any malicious feeling on his part against the servant. In order to support an action it must be proved that the character given was false, and also that it was maliciously given. *Fountain* v. *Boodle*, 3 Q. B. 12; *Hodgson* v. *Scarlett*, 1 B. & Ald. 240.

If a servant obtains a place upon the strength of a character given by the master, and the latter afterward discovers circumstances which induce him to believe that the character was undeserved, he is morally bound to inform the new master of those circumstances, and the com

munication made concerning them is privileged. *Gardner* v. *Slade*, 13 Q. B. 796 So, if a servant, when he is taken into a service, brings a written character, and is afterward discharged for ill behavior, it would seem that the master does no wrong if, before he returns the character to the servant, he writes upon it that the person was afterward in his service, and dismissed for ill behavior. *Taylor* v. *Rowan*, M. & Rob. 490; S. C., 7 Car. & P. 70. See *Rogers* v. *MacNamara*, 14 C. B. 27; *Hurrell* v. *Ellis*, 2 id. 295.

§ 10. **Of fidelity to master.** There are many duties which are implied by law from the relationship of master and servant, which are binding upon all servants. Thus, every servant is bound to obey all the lawful orders of his master, and to be honest and diligent in his master's business. See *ante*, Vol. 3, 600, title *Hire of Services*, § 13. So, every servant is bound to take due and proper care of his master's property intrusted to him, and, if he be guilty of gross negligence, whereby the property is injured, he will be liable therefor to an action, but he is not obliged to preserve his master's property in every event. *Nickson* v. *Brohan*, 10 Mod. 109; *Savage* v. *Walthew*, 11 id. 135. A servant is likewise liable to an action at the suit of his master for fraud or misfeasance. *Hussy* v. *Pacy*, 1 Lev. 188. So, where a third person has brought an action and recovered damages against the master for injuries sustained in consequence of the servant's negligence or misconduct, the servant is liable to an action at the suit of his master to indemnify the latter. *Pritchard* v. *Hitchcock*, 6 Man. & Gr. 165; *Green* v. *New River Co.*, 4 Term R. 589; *Zulkee* v. *Wing*, 20 Wis. 408. But see *Colburn* v. *Patmore*, 1 Cr. M. & R. 73.

A servant may justify a battery in the necessary defense of his master. 1 Broom & Had. Comm. (Wait's ed.) 340. And it is held that, where goods are wrongfully in the possession of another, a servant of the owner of the goods may justify an assault to repossess his master of them, no unnecessary violence being used. *Blades* v. *Higgs*, 10 C. B. (N. S.) 713.

It has, however, been questioned, whether the master can justify a battery in defense of his servant, and in one case it was adjudged that he could not. *Leeward* v. *Basilee*, 1 Salk. 407; S. C., 1 Ld. Raym. 62. But the weight of authority is on the side that he may. See 1 Broom & Had. Comm. (Wait's ed.) 340; 2 Kent's Com. 261. *Ante*, Vol. 1, title *Assault and Battery*.

ARTICLE III.

OF THE SERVANT'S RIGHTS AND LIABILITIES AS TO THIRD PERSONS.

Section 1. Servant not liable personally on contracts for master. See *ante*, Vol. 1, 256–260. As a general rule, a servant is not personally liable upon a contract entered into by him for and on account of the master. He may, however, like any other agent, contract in such a manner as to render himself personally liable (*Thomson* v. *Davenport*, 9 B. & C. 88; *Burrell* v. *Jones*, 3 B. & Ald. 50); as, where he contracts for the master without authority, or, having authority, he exceeds it. Id.; *Hochster* v. *Baruch*, 5 Daly (N. Y.), 440. In such case there can be no doubt that he will be personally liable to the person with whom he deals in his master's name. But if the person dealing with the servant knows of his want of authority, and yet chooses to charge the master, it would seem that the servant could not afterward be made liable in the event of the master failing to pay. *Smout* v. *Ilbery*, 10 Mees. & W. 1; *Patterson* v. *Gandasequi*, 15 East, 62. See 2 Sm. Lead. Cas. (7th Am. ed.) 360. Questions of this sort frequently depend upon the circumstances of the case; as, for instance, to whom was the credit given? If given to the master, the servant could not be made liable, provided he had authority to contract. But if the credit was given to the servant, even for goods supplied for his master's use, he could not discharge himself from liability on the ground that he was a mere agent. See *Chandler* v. *Coe*, 54 N. H. 561; *Maryland Coal Co* v. *Edwards*, 4 Hun (N. Y.), 432. A servant would also be liable, if, at the time he entered into a contract, he did not disclose his master's name, and it was not known to the party contracting with him, although he was known to be a mere agent. *Hanson* v. *Roberdeau*, Peake, 163; *Franklyn* v. *Lamond*, 4 C. B. 637; Smith's Mast. & Serv. 195. But where a servant has once had authority to contract in his master's name, and the authority is revoked without his knowledge, he would not be liable upon contracts entered into in his master's name, in ignorance of the revocation of his authority, even though the party with whom he contracted is remediless. *Smout* v. *Ilbery*, 10 Mees. & W. 1; *Blades* v. *Free*, 9 B. & C. 167; *Ginochio* v. *Porcella*, 3 Bradf. (N. Y.) 277; *Cassiday* v. *McKenzie*, 4 Watts & Serg. 282. See Vol. 1, 289, 290.

§ 2. **Liability for fraud.** The general principle, that a servant will not be held personally liable on a contract entered into by him on behalf of his master, has no application to cases where there is corruption

in the foundation of the contract, or it is bottomed in oppression or immorality. *Miller* v. *Aris*, 3 Esp. 232. Thus, if a servant falsely represents that he has authority when he has none, or, if knowing that his previous authority has been revoked, he enters into a contract in his master's name, he will be held to a personal liability thereon, his act in such case being regarded as fraudulent (See *Tryon* v. *Whitmarsh*, 1 Metc. [Mass.] 1; *Polhill* v. *Walter*, 3 B. & Ad. 114); and, whether liable upon the contract or not, the party has his remedy against the servant for the fraud. *Ballou* v. *Talbot*, 16 Mass. 461; *Noyes* v. *Loring*, 55 Me. 408. And see Vol. 1, 257, 258.

So, a servant who joins with and assists his master in the commission of a fraud is civilly responsible for the consequences, though his concurrence is unknown to the party injured; for, all directly concerned in the commission of a fraud are principals. *Cullen* v. *Thomson*, 4 Macq. H. L. Cas. 441.

§ 3. **Liability for torts.** A servant incurs no liability to third persons by reason of a failure on his part to perform his master's obligations. *Bristol, etc., Railway Co.* v. *Collins*, 5 H. & N. 969; *Montgomery County Bank* v. *Albany City Bank*, 7 N. Y. (3 Seld.) 459; *Henshaw* v. *Noble*, 7 Ohio St. 226. For mere nonfeasance or omission of duty, a servant is liable only to his own master, who, in accordance with the maxim "*respondeat superior*," is liable to answer for his servant's neglect. *Gidley* v. *Lord Palmerston*, 3 Brod. & B. 275; *Lane* v. *Cotton*, 12 Mod. 488. And see *post*, 410, art. 4, § 5. But for a misfeasance, or act of positive wrong, a servant is liable to third persons injured thereby, either alone or jointly with his master. *Montfort* v. *Hughes*, 3 E. D. Smith (N. Y.), 591; *Hewett* v. *Swift*, 3 Allen, 420; *Bennett* v. *Ives*, 30 Conn. 329. But see *Parsons* v. *Winchell*, 5 Cush. 592; *Campbell* v. *Portland Sugar Co.*, 62 Me. 552; S. C., 16 Am. Rep. 503. And where a servant employs another person to assist him in his work, and by the negligence or wrongful act of such person an injury is inflicted, all three are jointly liable. *Suydam* v. *Moore*, 8 Barb. 358; *Althorf* v. *Wolfe*, 22 N. Y. (8 Smith) 355. See Vol. 1, 264.

§ 4. **Torts of government agents.** See Vol. 1, 267. The government is not liable for the torts and frauds of its agents. Nor are public officers in a superior capacity in general responsible for the tortious acts of their subordinate officers. It does not, however, follow that such subordinate officers are not themselves responsible for their own misdeeds. Thus, although the postmaster-general cannot be held liable for the loss of letters in the post-office through the fault of his agents, yet, there can be no doubt as to an action lying against the party really offending. And the instances are numerous in which deputy post-

masters have been sued in damages for their own torts. *Rowning* v. *Goodchild*, 3 Wils. 443; S. C., 2 W. Bl. 906; *Stock* v. *Harris*, 5 Burr, 2709. And see Vol. 2, 15.

There is also a large class of cases in which public officers in a merely ministerial capacity have been held liable to answer in an action at the suit of the party injured, for negligence in the performance of the duties cast upon them. Thus, a sheriff, whose duty in many cases, such as the receipt, execution, and return of writs, is that of a merely ministerial officer, is liable to be sued by the party aggrieved for any act of irregularity, misfeasance, or nonfeasance in executing writs. Bac. Abr., tit. *Sheriff*.

ARTICLE IV.

OF THE MASTER'S RIGHTS AND LIABILITIES AS TO THIRD PERSONS.

Section 1. Action for injuries to servant. The master's right of action for personal injuries sustained by his servant is recognized in many instances. Thus, he may recover for an actual battery inflicted upon his servant (*Duel* v. *Harding*, Strange, 595), or for an injury to his servant caused by negligent driving (*Martinez* v. *Gerber*, 3 Man. & G. 88; *Hall* v. *Hollander*, 4 B. & C. 660), or arising from the bite of a ferocious dog. *Hodsoll* v. *Stallebrass*, 11 Ad. & El. 301. And a recovery was had in an action against a person for negligently intrusting a loaded gun to a mulatto girl, who discharged it against the plaintiff's son and servant. *Dixon* v. *Bell*, 1 Stark. 287; S. C., 5 M. & S. 198. So, where a declaration in tort alleged that the defendant was a common carrier of passengers between two places; that the plaintiff's apprentice was on the defendant's car on a day stated, for hire paid by the apprentice in the absence of the master; that by the defendants' negligence in carrying the apprentice he was injured, and the plaintiff thereby lost his services, it was held, on demurrer, that the declaration disclosed a good ground of action. *Ames* v. *Union Railway Co.*, 117 Mass. 541; S. C., 19 Am. Rep. 426. See *Alton* v. *Midland Railway Co.*, 19 C. B. (N. S.) 213. But in all these cases the right of action grows out of the loss of service sustained by the master, and if there is no injury in that respect, there can be no recovery. Id.; *Robert Marys' Case*, 9 Coke, 113. A service *de facto* is, however, sufficient to support the action (see *Martinez* v. *Gerber*, 3 Man. & Gr. 88); and if there is a capacity to serve, very slight evidence is sufficient to support the allegation of service. See *Torrence* v. *Gibbins*, 5 Q. B. 300; *Dixon* v. *Bell*, 1 Stark. 287; S. C., 5 M. & S. 198.

But a master cannot maintain an action for injuries which cause the immediate death of his servant. *Osborn* v. *Gillett*, L. R., 8 Exch. 88; S. C., 4 Eng. R. 464. See Vol. 2, tit. *Death.*

§ 2. **Seduction, enticing, or harboring servant.** The action for seduction is predicated upon a loss of service, and, by a legal fiction, it can only be maintained where the relationship of master and servant exists between the party bringing the action and the party seduced. *Grinnell* v. *Wells*, 2 Dowl. & L. 610; S. C., 7 Man. & Gr. 1033; *Mercer* v. *Walmsley*, 5 Har. & J. (Md.) 27; *Hewit* v. *Prime*, 21 Wend. 79; *Blanchard* v. *Ilsley*, 120 Mass. 487; S. C., 21 Am. Rep. 535. See *post*, tit. *Seduction.*

The action is usually brought by the parent, or one standing in the stead of the parent; but the gist of the action being loss of service, it follows that it may be brought by any one who has sustained that loss. A master may, therefore, maintain an action for debauching his servant, though he is no way related to her in blood. *Fores* v. *Wilson*, Peake, 55; *Ball* v. *Bruce*, 21 Ill. 161; *Irwin* v. *Dearman*, 11 East, 23. See tit. *Seduction.*

It must now be considered as settled law, that a person who wrongfully and maliciously, or, which is the same thing, with notice, interrupts the relation subsisting between master and servant, by procuring the servant to depart from the master's service, or by harboring him and keeping him as a servant after he has quitted it, and during the time stipulated for as the period of service whereby the master is injured, commits a wrongful act, for which he is responsible at law. *Walker* v. *Cronin*, 107 Mass. 555; *Lee* v. *West*, 47 Ga. 311; *Bixby* v. *Dunlap*, 56 N. H. 456; 22 Am. Rep. 475; *Jones* v. *Stanly*, 76 N. C. 355; *Daniel* v. *Swearengen*, 6 S. C. 297; *Caughey* v. *Smith*, 47 N. Y. (2 Sick.) 244; *Pilkington* v. *Scott*, 15 M. & W. 657; *Sykes* v. *Dixon*, 9 Ad. & El. 693; *Lumley* v. *Gye*, 2 El. & Bl. 216. And the relation of master and servant subsists sufficiently for the purpose of such action, during the time for which there is in existence a binding contract of hiring and service between the parties. Id.; *Blake* v. *Lanyon*, 6 Term R. 221; *Haskins* v. *Royster*, 70 N. C. 601; S. C., 16 Am. Rep. 780. And the fact that the servant is employed under a contract voidable by him does not defeat the action for inducing away, since the wrong consists in enticing the servant to *avoid* the contract. *Keane* v. *Boycott*, 2 H. Bl. 511.

But the mere attempt to entice a servant away, followed by no damage, does not entitle the master to an action. *Bird* v. *Randall*, 3 Burr. 1352. See *Carew* v. *Rutherford*, 106 Mass. 1; 8 Am. Rep. 287. Nor will an action lie for inducing a servant to leave his master's service at

the expiration of the time for which the servant had hired himself, although the servant had no intention, at the time, of quitting his master's service. *Nichol* v. *Martyn*, 2 Esp. 734; *Boston Glass Manuf. Co.* v. *Binney*, 4 Pick. 425. And no action lies for seducing a servant from his master, who has paid the penalties stipulated by his article for leaving him. *Bird* v. *Randall*, 3 Burr. 1345; S. C., 1 W. Bl. 373, 387.

Under a count for harboring or entertaining a servant, evidence of enticement is not necessary (*Dubois* v. *Allen*, Anth. [N. Y.] 128); nor is it essential that such a state of facts should exist as would sustain an action for enticing away. *Fawcett* v. *Beavres*, 2 Lev. 63.

Societies of laborers, so long as they confine their objects and action within proper limits, and do no more as a society than each individual member thereof might lawfully do, cannot be held to be unlawful organizations at common law. *Commonwealth* v. *Hunt*, 4 Metc. 111; *Snow* v. *Wheeler*, 113 Mass. 179. But when workmen combine to prevent others from working for another, either by force or by persuasion, the act is unlawful and such persons are liable for all the damages resulting, and in case the injury is irreparable in damages, or the individuals are irresponsible and unable to respond to a judgment for damages, a court of equity will interpose by injunction to restrain them. *Springhead Spinning Co.* v. *Riley*, L. R., 6 Eq. Cas. 551. So, persons who associate themselves to coerce an employer into paying money which he is not legally bound to pay, by threats that if he refuses they will induce his workmen to leave his service, and will deter others from taking their places, are chargeable with an illegal conspiracy; and if their threats are carried out, the employer aggrieved may recover damages in an action for the wrong done. *Carew* v. *Rutherford*, 106 Mass. 1; 8 Am. Rep. 287. See *Commonwealth* v. *Curren*, 3 Pittsb. (Penn.) 143.

In an action for enticing away the plaintiff's servants, the measure of damages is not to be ascertained at the actual loss which he sustained at the time, but for the injury done him by causing them to leave his employment. *Gunter* v. *Astor*, 4 Moore, 12. And see *Hays* v. *Borders*, 6 Ill. 46.

In an action for enticing away an apprentice, the plaintiff is held to be entitled to recover damages as for a total loss of services, if a total loss has been in reality the consequence of the acts of the defendant; if not, then the damages should be estimated according to the chances the plaintiff had of regaining his apprentice. *McKay* v. *Bryson*, 5 Ired. (N. C.) L. 216. See, also, *Stout* v. *Woody*, 63 N. C. 37. But if a servant or minor child absconds from his father's house, and

enters the service of one who for his labor furnishes the infant a reasonable support, not knowing that he has absconded, the parent cannot recover for the infant's services, without deducting the amount of the expense for such support. *Huntoon* v. *Hazelton*, 20 N. H. 388.

§ 3. **Right to servant's acquisitions.** A master deprived of the services of an apprentice or servant, who has been enticed away and harbored by another master, is not confined to an action for damages for the injury he has sustained by the loss of his servant. He may in some cases waive the tort, and bring an action to recover the wages due to his apprentice or servant from such second master, upon the well-settled principle that the master shall have the advantage of his servant's contracts as to matters within the scope of the service. *Damon* v. *Osborn*, 1 Pick. 481; *Lightly* v. *Clouston*, 1 Taunt. 112; Smith's Mast. & Serv. 80. But no recovery can be had, in this form, unless labor has been performed by the servant, and the master cannot claim any other acquisitions than such as are the result of that labor. *Shanley* v. *Hervey*, 20 How. St. Tr. 65, n. Nor can he claim what the servant may have acquired during the service entirely without the legitimate consideration of such service. Thus, if a servant, not employed to invent, make an invention whilst in the employ of a master, the invention belongs to the servant, and the master cannot take out a patent for it. *Bloxam* v. *Elsee*, 1 Carr. & P. 558. And the same rule applies to salvage money which is the result of extraordinary service; the share of an apprentice belongs to him and not to his master. *Mason* v. *Ship Blaireau*, 2 Cranch (U. S.), 240. And in the case of an apprentice who has enlisted in the army, the master cannot intercept the wages due to the apprentice. The government recognizes the employment as a personal contract with the soldier. The wages earned are paid to him, and if he dies before payment, his administrator is the only person entitled to receive them. *United States* v. *Bainbridge*, 1 Mas. (C. C.) 84; *Johnson* v. *Dodd*, 56 N. Y. (11 Sick.) 76.

The main advantage attending this form of action is that it may be brought after the death of the tort-feasor, which is not the case with an action framed on the tort. *Foster* v. *Stewart*, 3 M. & S. 191. But, on the other hand, it is open to the objection that it admits of a set-off and deductions. *Lightly* v. *Clouston*, 1 Taunt. 112. An action for the tort is, accordingly, the more usual remedy, and in such action the jury may, if the circumstances justify their so doing, give the plaintiff greater damages than the mere wages of the servant would amount to. Smith on Mast. & Serv. 82; *Daniel* v. *Swearengen*, 6 S. C. 297, 302.

§ 4. **Liability for servant's acts or contracts as agents.** No power can be inferred from the relation of master and servant, strictly

speaking, whereby the servant can bind his master. *Moore* v. *Tick e*, 3 Dev. (N. C.) L. 244. It is only upon the ground that a servant is the *agent* of his master, that a master can, in any case, be made liable upon contracts entered into by his servant; and this, on the principle that the act of the servant or agent is, in fact, the act of his master or principal,—the maxim being, *Qui facit per alium, facit per se.* Smith on Mast. & Serv. 122. See Bac. Abr., tit. *Mast. & Serv.* (K.); Broom's Leg. Max. 817. The well-known rules of agency are, therefore, applicable in this connection, and as these rules have been fully set out in a preceding title, they need not be here repeated at length. See Vol. 1, tit. *Agency.* It may, however, be observed generally, that the contract of a servant, in order to be binding on his master, must be within the scope of the authority intrusted to the servant; that this authority may be given either *expressly*, or by *implication;* that a ratification by the master of the servant's acts is equivalent to an original authority; that the authority of a servant is co-extensive with his usual employment; and that the scope of his authority is to be measured by the extent of his employment. See Vol. 1, 220, 240, 285.

§ 5. **Liability for servant's torts.** A master is ordinarily liable to answer in a civil suit for the tortious or wrongful acts of his servant, whether of omission or commission, and whether negligent, fraudulent, or deceitful, if those acts are done in the course of his employment in his master's service (*Southwick* v. *Estes*, 7 Cush. 385; *Levi* v. *Brooks*, 121 Mass. 501; *Philadelphia, etc., R. R. Co.* v. *Derby*, 14 How. [U. S.] 468), even though the master did not authorize or know of such acts, or may have disapproved of or forbidden them. Id.; *Robinson* v. *Webb*, 11 Bush (Ky.), 464; *Snyder* v. *Hannibal, etc., R. R. Co.*, 60 Mo. 413; *McGlothlin* v. *Madden*, 16 Kans. 466. And wantonness or mischief, causing additional bodily or mental suffering, in the injurious act of a servant within the scope of his employment, will enhance the damages as against the master. *Hawes* v *Knowles*, 114 Mass. 518; S. C., 19 Am. Rep. 383. *Ante*, Vol. 1, 287, 288.

A master is not, however, responsible for the wrongful act of his servant, unless that act be done in the execution of the authority given by the master. Beyond the scope of his employment, he is as much a stranger to his master as any third person, and therefore his act cannot be regarded as the act of his master. *Croft* v. *Alison*, 4 B. & Ald. 590; *McKenzie* v. *McLeod*, 10 Bing. 385; *Lamb* v. *Palk*, 9 Carr. & P. 629; *Wilson* v. *Peverly*, 2 N. H. 548; *Church* v. *Mansfield*, 20 Conn. 284; *Bard* v. *Yohn*, 26 Penn. St. 482. Thus, an action cannot be maintained against the owner of a bridge to recover damages for

the bite of a vicious dog belonging to the toll-keeper, if it appear that the owner did not keep or harbor the dog in person, and did not authorize or require him to be kept, and did not need that the dog should be kept for the conduct or protection of the business in which the owner of the dog was employed, or as his assistant as toll-keeper. *Baker* v. *Kinsey*, 38 Cal. 631. And where a person, after purchasing of a railroad company a ticket as a passenger, applied to the servant charged with the duty of checking baggage, to have his baggage checked to his place of destination, and by his abusive language and menacing gestures toward the servant provoked a quarrel, in which the servant struck him with a hatchet, it was held that the passenger could not recover of the railroad company for the resulting injury. *Little Miami R. R. Co.* v. *Wetmore*, 19 Ohio St. 110; S. C., 2 Am. Rep. 373. But see *Walker* v. *South-Eastern Railway Co.*, L. R., 5 C. P. 640; 39 L. J. C. P. 34 .

Whether a servant was acting in *the course of his employment* when he committed a tortious act, is a question of fact. *Redding* v. *South Carolina R. R. Co.*, 3 S. C. 1; S. C., 16 Am. Rep. 681.

And the liability of one person for damages arising from the tortious acts of another, on the principle of *respondeat superior*, is confined to the relation of master and servant, or principal and agent, and does not apply to independent contracts where the employer does not keep control over the mode and manner of the contract work. *Cincinnati* v. *Stone*, 5 Ohio St. 38; *Wilson* v. *Alleghany City*, 79 Penn. St. 272. See, also, *Yates* v. *Squires*, 19 Iowa, 26; *Norton* v. *Wiswall*, 26 Barb. 618.

It has been held in Maine that a servant who sets fire to his master's house by his master's procurement for the purpose of defrauding the insurers is not guilty of arson, either at common law, or under a statute making it arson to burn the dwelling-house of another. *State* v. *Haynes*, 66 Me. 307; S. C., 22 Am. Rep. 569.

§ 6. **Liability for servant's neglect.** That the master is liable for the servant's negligence, within the scope of the latter's employment, is a well-established elementary rule, based upon the assumption that the act of the servant is the act of the master (*Courtney* v. *Baker*, 5 Jones & Sp. [N. Y.] 249; *Cleghorn* v. *N. Y. Cent. & Hudson R. R. R. Co.*, 56 N. Y. [11 Sick.] 44; S. C., 15 Am. Rep. 375; *Robinson* v. *Webb*, 11 Bush [Ky.], 464; *Johnson* v. *Bruner*, 61 Penn. St. 58; *Allison* v. *Western, etc., R. R. Co.*, 64 N. C. 382; *Laugher* v. *Pointer*, 5 B. & C. 547; *Pickens* v. *Dicker*, 21 Ohio St. 212; 8 Am. Rep. 55; *Smith* v. *Webster*, 23 Mich. 298); and this without any regard to the character of the servant for care or skill. *Hays* v. *Millar*, 77 Penn.

St. 238; S. C., 18 Am. Rep. 445. Thus, the owner of a raft is held liable for any damage which may be done to the property of others upon the river, occasioned by negligence or unskillful management of his pilot, although he had employed men who were represented to be skillful watermen. *Shaw* v. *Reed*, 9 Watts & Serg. 72. And see *Martin* v. *Temperley*, 4 Q. B. 298; *Bigley* v. *Williams*, 80 Penn. St. 107. But a master will not be liable for an act of his servant, which would not have constituted any cause of action against him, if done by himself. *Poulton* v. *Southwestern Railway Co.*, L. R., 2 Q. B. 534; *Russell* v. *Irby*, 13 Ala. 131. And if a negligent act be done by a servant, while he is at liberty from service and pursuing his own ends exclusively, the master is not liable for the injury produced thereby, even if it could not have been committed without facilities afforded to the servant by his relations to his master. *Mitchell* v. *Crassweller*, 13 C. B. 237; *Garretzen* v. *Duenckel*, 50 Mo. 104; S. C., 11 Am. Rep. 405; *Bard* v. *Yohn*, 26 Penn. St. 482; *Storey* v. *Ashton*, L. R., 4 Q. B. 476; *Sheridan* v. *Charlick*, 4 Daly (N. Y.), 338. Thus, a coachman, after having used his master's horse and carriage in going upon an errand for his master, instead of taking it to the stable, used it in going upon an errand of his own, without his master's knowledge or consent. While doing so, he negligently ran into and injured the plaintiff's horse — and it was held that his master was not liable. Id. See, also, *Campbell* v. *City of Providence*, 9 R. I. 262. But see *Sleath* v. *Wilson*, 9 Carr. & P. 601; *Joel* v. *Morison*, 6 id. 501. Nor is a master responsible for an injury caused by his servant's negligence to a person who might, by the exercise of ordinary care, have avoided the consequences of the servant's negligence. It is not, however, sufficient, in order to exempt a master from responsibility, to show that the party injured did, by his own act, contribute to the injury, but it must be shown that he did not use ordinary care to avoid the consequences of the servant's negligence. *Butterfield* v. *Forrester*, 11 East, 60; *Clayards* v. *Dethick*, 12 Q. B. 439; *Beers* v. *Housatonic R. R. Co.*, 19 Conn. 566. Where, however, the party injured was a child, incapable of taking care of itself, a master has been held liable for injury caused to the child by the negligence of his servant, although the child itself, by its own act, brought about the accident. *Lynch* v. *Nurdin*, 1 Q. B. 29. See *post*, tit. *Negligence*.

If a servant driving his master's carriage along the highway carelessly runs over a by-stander, or if a gamekeeper employed to kill game carelessly fires at a hare, so as to shoot a person passing on the ground, or if a workman employed by a builder in building a house negligently throws a stone or brick from a scaffold, and so hurts a passer-by,— in all these cases, the person injured has a right to treat the wrongful or

careless act as the act of the master. And the law does not permit the master to escape liability because the act complained of was not done with his own hand. *Bartonshill Coal Co.* v. *Reid*, 3 Macq. S. C. App. Cas. 266. In a Vermont case, the defendant put a bag containing barley into his wagon under his shed. In two or three days thereafter, his hired servant took the bag from the wagon, supposing it to contain oats, and carried it to a place where he was drawing logs for his master, to feed his horses with its contents. Finding his mistake, the servant fed some of the barley, and then put an iron bolt that he had been using as a clevice pin, into the bag and carried the bag home and put it into the wagon where he found it, with the barley and bolt in it, without informing his master of what he had done. Soon after, the defendant not knowing what his servant had done, nor that the bolt was in the bag, filled the bag with ears of corn, and carried the corn to the plaintiff's mill to be ground, and in grinding, the bolt got into the corn-cracker and injured it, and it was held that the defendant was liable for the carelessness of his servant. *Tuel* v. *Weston*, 47 Vt. 634. See, also, *Phelon* v. *Stiles*, 43 Conn. 426. So, if the servant is acting within the scope of his employment, the master is liable, even for an act the very reverse of that which the servant was actually directed to do. *Bayley* v. *Manchester, etc., Railway Co.*, L. R., 8 C. P. 153; S. C. affirmed, 7 id. 445; S. C., 4 Eng. R. 384; *Southwick* v. *Estes*, 7 Cush. 385; *Priester* v. *Augley*, 5 Rich. (S. C.) 44; *Higgins* v. *Watervliet T. & R. Co.*, 46 N. Y. (1 Sick.) 23; 7 Am. Rep. 293. The test of the master's responsibility for the act of his servant is, whether the act was done in the prosecution of the master's business, not whether it was done in accordance with the instructions of the master to the servant. When, therefore, the servant while engaged in the prosecution of the master's business deviates from his instructions as to the manner of doing it, this does not relieve the master from liability for his acts. *Cosgrove* v. *Ogden*, 49 N. Y. (4 Sick.) 255; S. C., 10 Am. Rep. 361. See, also, *Peck* v. *N. Y. Cent. & Hud. R. R. R. Co.*, 8 Hun (N. Y.), 286; *Garretzen* v. *Duenckel*, 50 Mo. 104; S. C., 11 Am. Rep. 405; *Ewbank* v. *Nutting*, 7 C. B. 797. The master is likewise liable for the negligence of one whom his servant employs, to assist such servant in the master's business. *Althorf* v. *Wolfe*, 22 N. Y. (8 Smith) 355; *Randleson* v. *Murray*, 8 Ad. & El. 109; *Rapson* v. *Cubitt*, 9 M. & W. 710. And where the defendant's cart was driven by a person, not in his employ, but to whom his servant had intrusted the reins, and the plaintiff's cabriolet was injured by the cart being driven against it, the defendant was held liable, although the driver of the cart was not in his service. *Booth* v. *Mister*, 7 Carr. & P. 66.

§ 7. **Liability for negligence or tort to fellow-servant.** One who enters the service of another takes upon himself the ordinary risks of the employment in which he engages, including the negligent acts of his fellow-workmen in the course of the employment. *Howd* v. *Miss. Cent. R. R. Co.*, 50 Miss. 178; *Coombs* v. *New Bedford Cordage Co.*, 102 Mass. 572; *Lovell* v. *Howell*, 1 Com. Pleas. Div. 161; S. C., 16 Eng. R. 501. A master is not, therefore, responsible to his own servant for any injury happening to him through the negligence or wrongful act of a fellow-servant while engaged in the same common employment, provided the master has not been negligent in the selection or retention of the servant at fault. Id.; *Malone* v. *Hathaway*, 64 N. Y. (19 Sick.) 5; S. C., 21 Am. Rep. 573; *Union Pacific R. R.* v. *Young*, 8 Kans. 658; *Brothers* v. *Cartter*, 52 Mo. 372; 14 Am. Rep. 424; *Lee* v. *Detroit Bridge & Iron Works*, 62 id. 565; *Wonder* v. *Baltimore & Ohio R. R. Co.*, 32 Md. 411; S. C., 3 Am. Rep. 143; *Anderson* v. *Milwaukee, etc., R. R. Co.*, 37 Wis. 321; *Davis* v. *Detroit, etc., R. R. Co.*, 20 Mich. 105; S. C., 4 Am. Rep. 364; *Yeomans* v. *Contra Costa S. N. Co.*, 44 Cal. 71; *Price* v. *Houston Direct Navigation Co.*, 46 Tex. 535; *Pittsburgh, etc., Railway Co.* v. *Ruby*, 38 Ind. 294; S. C., 10 Am. Rep. 111; *Summerhays* v. *Kansas Pacif. Railway Co.*, 2 Col. T. 484; *Chicago & Alton R. R. Co.* v. *Murphy*, 53 Ill. 336; S. C., 5 Am. Rep. 48; *Columbus, etc., R. R. Co.* v. *Webb*, 12 Ohio St. 475; *Mich. Cent. R. R. Co.* v. *Dolan*, 32 Mich. 510; *Weger* v. *Penn. R. R. Co.*, 55 Penn. St. 460; *Skipp* v. *Eastern Counties Railway Co.*, 9 Exch. 223; *Murray* v. *Currie*, L. R., 6 C. P. 24; *Wilson* v. *Merry*, L. R., 1 Sc. App. Cas. 326. The application of this rule is usually to railway companies and other common carriers, but it applies to every establishment. No member of an establishment can maintain an action against the master for an injury done to him by another member of that establishment, in respect of which, if he had been a stranger, he might have had a right of action. *Abraham* v. *Reynolds*, 5 Hurlst. & N. 143. Nor is it necessary to exempt the master from liability that the sufferer and the one who causes the injury should be at the time engaged in the same particular work. If they are in the employment of the same master, engaged in the same common work, and performing duties and services for the same general purposes, the master is not liable. *Laning* v. *New York Central R. R. Co.*, 49 N. Y. (4 Sick.) 521, 528; S. C., 10 Am. Rep. 417; *Baird* v. *Pettit*, 70 Penn. St. 477; *Wood* v. *New Bedford Coal Company*, 121 Mass. 252; *Feltham* v. *England*, L. R., 2 Q. B. 36; *Wiggett* v. *Fox*, 11 Exch. 832. Nor does it vary the case if it appear that the

plaintiff, instead of being regularly employed by the defendant, voluntarily undertook, without an appointment, to act as the defendant's servant. *Degg* v. *Midland Railway Co.*, 1 Hurlst. & N. 773; *New Orleans, etc., R. R. Co.* v. *Harrison*, 48 Miss. 112; S. C., 12 Am. Rep. 356; *Flower* v. *Pennsylvania R. R. Co.*, 69 Penn. St. 210; S. C., 8 Am. Rep. 251.

A "fellow-servant," within the meaning of the general rule, is usually held to be any one serving the same master, and under his control, whether equal, inferior or superior to the injured person, in his grade or standing. Thus, a foreman is a fellow-servant with those employed under him. *Gallagher* v. *Piper*, 16 C. B. (N. S.) 669; *Feltham* v. *England*, L. R., 2 Q. B. 33; *Marshall* v. *Schrieker*, 63 Mo. 308. So is a general manager (*Searle* v. *Lindsay*, 11 C. B. [N. S.] 429), or a superintendent. *Albro* v. *Agawam Canal Co.*, 6 Cush. 75; *Lawler* v. *Androscoggin R. R. Co.*, 62 Me. 463; S. C., 16 Am. Rep. 492. See, also, *Rohback* v. *Pacific R. R. Co.*, 43 Mo. 187; *Thayer* v. *St. Louis, etc., R. R. Co.*, 22 Ind. 26; *Shauck* v. *Northern, etc., R. R. Co.*, 25 Md. 462. It has, however, been held that a superintendent appointed by a company, and having entire supervision and control over the work, with power to employ, direct and discharge the laborers, is not a fellow-servant, although he engages in the same work with the laborer. *Gormly* v. *Vulcan Iron Works*, 61 Mo. 492; *Whalen* v. *Centenary Church*, 62 id. 326; *Brabbets* v. *Chicago, etc., R. R. Co.*, 38 Wis. 289. And see note to *Malone* v. *Hathaway*, 21 Am. Rep. 579, 582; *Hardy* v. *Carolina, etc., R. R. Co.*, 76 N. C. 5. So, the rule exempting the master from liability for the negligence of a fellow-servant has no application where the one servant is employed in a separate and disconnected branch of the business from that of the other. *Nashville, etc., R. R. Co.* v. *Carroll*, 6 Heisk. (Tenn.) 347. Thus, the rule does not apply to the case of a day laborer employed by a railroad company from day to day, who was injured in returning from work on the company's cars, through an accident occasioned by the misconduct of the engine-driver. *Russell* v. *Hudson River R. R. Co.*, 5 Duer (N. Y.), 39; *Ryan* v. *Chicago, etc., Railway Co.*, 60 Ill. 171; S. C., 14 Am. Rep. 32. Nor to the case of a mere day laborer on the track of the company, so injured. *Toledo, etc., R. R. Co.* v. *O'Connor*, 77 Ill. 391. But see *Gillshannon* v. *Stony Brook R. R. Co.*, 10 Cush. 228; *Ryan* v. *Cumberland Valley R. R. Co.*, 23 Penn. St. 384. Nor does the rule apply where one servant employed to perform his duties under the orders of another superior servant, is directed by the latter to do an act not in the usual course of his duties, and, while so engaged, is injured by the negligence of the

superior. *Union Pacific Railroad Company* v. *Fort*, 17 Wall. 553; *Siegel* v. *Schantz*, 2 N. Y. Sup. (T. & C.) 353. See *Anderson* v. *Morrison*, 22 Minn. 274. Nor has the rule any application where the offending servant is wanting in skill or prudence, which fact is known to the employer, or could have been ascertained by him by reasonable inquiry. *New Orleans, etc., R. R. Co.* v. *Hughes*, 49 Miss. 258; *Alabama, etc., R. R. Co.* v. *Waller*, 48 Ala. 459; *Pittsburgh, etc., R. R. Co.* v. *Ruby*, 38 Ind. 294; S. C., 10 Am. Rep. 111. And if a master negligently or knowingly employs or retains in his service those who are incompetent and unfit for the duties to which they are assigned, he is liable to respond to other employees and servants engaged in the same service, who may sustain damages by reason of such incompetence and unfitness. Id.; *Baulec* v. *New York & Harlem R. R. Co.*, 52 N. Y. (7 Sick.) 633; S. C., 48 How. 399; S. C. again, 59 N. Y. (14 Sick.) 356; S. C., 17 Am. Rep. 325. And when the master is a corporation, necessarily acting by and through agents, the acts of its general agents, charged with the employment and discharge of servants in the performance of that duty, must be regarded as the acts of the corporation. Id.; *Huntingdon, etc., R. R.* v. *Decker*, 84 Penn. St. 419; *Flike* v. *Boston & Albany R. R. Co.*, 53 N. Y. (8 Sick.) 549; S. C., 13 Am. Rep. 545. See *Frazier* v. *Pennsylvania R. R. Co.*, 38 Penn. St. 104; *Walker* v. *Bolling*, 22 Ala. 294; *Noyes* v. *Smith*, 28 Vt. 59; *Harper* v. *Indianapolis, etc., R. R. Co.*, 47 Mo. 567; 14 Am. Rep. 353; *Mullan* v. *Philadelphia, etc., Steamship Co.*, 78 Penn. St. 25; S. C., 21 Am. Rep. 2. There is held to be no implied contract between the owners of a ship and a pilot whom they are compelled to employ, that the pilot shall take upon himself the risk of injury from the negligence of the shipowners' servants. An action will, therefore, lie by the pilot against the shipowners for injuries caused to him whilst acting as pilot on board their vessel, by the negligence of their servants. *Smith* v. *Steele*, L. R., 10 Q. B. 125; S. C., 11 Eng. R. 194.

§ 8. **Master's neglect to the injury of the servant.** A master does not warrant the safety of his servants (*Riley* v. *Baxendale*, 6 Hurlst. & N. 445; *Indianapolis, etc., R. R. Co.* v. *Love*, 10 Ind. 554; *Toledo, etc., Railway Co.* v. *Conroy*, 61 Ill. 162; *Columbus, etc., R. R. Co.* v. *Troesch*, 68 id. 545; 18 Am. Rep. 578; *Tinney* v. *Boston & Albany R. R. Co.*, 62 Barb. 218; S. C. affirmed, 52 N. Y. [7 Sick.] 632); but he is directly liable to them, as much as to any one else, for his own negligence. *Brydon* v. *Stewart*, 2 Macq. H. L. Cas. 30; *Ardesco Oil Co.* v. *Gilson*, 63 Penn. St. 146; *Fifield* v. *Northern R. R. Co.*, 42 N. H. 225. And where a servant receives an injury occasioned in

part by the negligence of his master, and in part by that of a fellow-servant, he can maintain an action against his master for such injury. *Paulmier* v. *Erie Railway Co.*, 34 N. J. Law, 151; *Cayzer* v. *Taylor*, 10 Gray, 274.

The general rule is that, in ordinary cases, where a workman is employed to do a dangerous job, or to work in a service of peril, if the danger belongs to the work itself, or to the service in which he engages, he will be held to all the risks which belong to either. But where there is no danger in the work or service in itself, and the peril grows out of extrinsic causes or circumstances, which cannot be discovered by the use of ordinary precaution and prudence, the employer is liable precisely as a third person, if the loss or injury is caused by his neglect or want of care. *Perry* v. *Marsh*, 25 Ala. 659. See, also, *Baxter* v. *Roberts*, 44 Cal. 187; *Williams* v. *Clough*, 3 Hurlst. & N. 258; *Indermaur* v. *Dames*, L. R., 2 C. P. 313; *Morgan* v. *Vale of Neath Railway Co.*, 5 B. & Sm. 570; S. C. affirmed, L. R., 1 Q. B. 145; *Gibson* v. *Pacific R. R. Co.*, 46 Mo. 163; 2 Am. Rep. 497; *Cumberland, etc., R. R. Co.* v. *State*, 44 Md. 283. A servant has a right to repose confidence in the prudence and caution of his employer, and to rely upon his not putting him in charge of implements which, from improper construction or other causes, are so dangerous that a prudent man would not make use of them (*LaClair* v. *St. Paul, etc., R. R. Co*, 20 Minn. 9; *Fort Wayne, etc., R. R. Co.* v. *Gildersleeve*, 33 Mich. 133; *Buzzell* v. *Laconia, etc., Co.*, 48 Me. 113); and this includes an obligation to provide a suitable place in which the servant, being himself in the exercise of due care, can perform his duty safely, or at least without exposure to dangers that do not come within the obvious scope of his employment. *Coombs* v. *New Bedford Cordage Co.*, 102 Mass. 572. And see *Chicago, etc., R. R. Co.* v. *Jackson*, 55 Ill. 492; 8 Am. Rep. 661; *Columbus, etc., Railway Co.* v. *Arnold*, 31 Ind. 175; *Keegan* v. *Kavanaugh*, 62 Mo. 230. And where a servant is employed on machinery, from the use of which danger may arise, it is the duty of the master to take due care, and to use all reasonable means to guard against and prevent any defects from which increased and unnecessary danger may occur. *Clarke* v. *Holmes*, 7 Hurlst. & N. 937. And see *Hayden* v. *Smithville, etc., Co.*, 29 Conn. 548.

And it is held that the servant, whose duty it is to keep machinery in repair, is not a fellow-servant with one whose duty it is to use the same machinery, so as to exempt the master from liability on that ground for an injury to the latter, in consequence of the neglect of the former. *Shanny* v. *Androscoggin Mills*, 66 Me. 420.

Where an employee was injured by the falling of a hoisting appara-

tus, it was held that the liability of the defendants (the employers) depended upon three facts: *First*, that the method of attaching the hoisting rope was defective and unsafe, and that the injury was caused by the defect. *Second*, that the defendants knew or ought to have known of the defect. *Third*, that the plaintiff did not know of it, and had not equal means of knowledge. *Malone* v. *Hawley*, 46 Cal. 409. See *McGlynn* v. *Brodie*, 31 id. 376; *Byron* v. *New York State Printing Telegraph Co.*, 26 Barb. 39. A railroad corporation, which negligently suffered one of its bridges to remain in an unsafe condition, was held liable to one of its servants for injuries sustained by the giving way of the bridge. *Harrison* v. *Central R. R. Co.*, 31 N. J. Law, 293. So, where the plaintiff, a fireman employed by the defendant, was injured by the explosion of the boiler of the locomotive on which he worked, the defective and dangerous condition of which had often been reported to the defendants, they were held liable. *Keegan* v. *Western R. R. Co.*, 8 N. Y. (4 Seld.) 175. So, where the plaintiff was employed in the defendant's mill, and in consequence of the want of a proper support to a privy on the premises, of which the defendant was aware, it gave way, injuring the plaintiff, the defendant was held liable. *Ryan* v. *Fowler*, 24 N. Y. (10 Smith) 410. And where the plaintiff was employed by the defendants to cut up the carcases of cattle, but was not informed by the defendants that in cutting them up he would expose himself to danger on account of the diseased state of the flesh, and he was injured from that cause, it was held that the defendants were liable, as in not informing him of the fact of danger, of which they knew and of which he was ignorant, they did not take all reasonable percautions for his safety. *Davies* v. *England*, 10 Jur. (N. S.) 1235. And see *Span* v. *Ely*, 8 Hun (N. Y.), 255.

In *Lewis* v. *St. Louis, etc., R. R. Co.*, 59 Mo. 495; S. C., 21 Am. Rep. 385, the plaintiff, while in the defendant's employ as a brakeman, was injured by a defect in the defendant's road-bed, of which the section foreman, whose duty it was to keep the road-bed in repair, had notice; and it was held that the negligence of such foreman was the negligence of the company, and that the defendant was liable.

If the servant voluntarily and unnecessarily puts himself in a place of danger, and is thereby injured, the master is not liable. *Felch* v. *Allen*, 98 Mass. 572; *Sprong* v. *Boston & Albany R. R. Co.*, 60 Barb. 30; *Corbin* v. *American Mills*, 27 Conn. 274. And in short, all that can be required of the master, and for the neglect of which he is responsible to the servant is, *first*, that he shall use due and reasonable diligence in providing safe and sound machinery, and in the selection of fellow-servants of competent skill and prudence, so as to

make it reasonably probable that injury will not occur in the exercise of the employment; and *second*, that, as far as he can by reasonable care, he shall avoid exposing his servant to extraordinary risks. *Wonder* v. *Baltimore & Ohio R. R. Co.*, 32 Md. 411; S. C., 3 Am. Rep. 143; *Hardy* v. *Carolina, etc., Railway Co.*, 76 N. C. 5; *Hill* v. *Gust*, 55 Ind. 45.

§ 9. **Master not liable for the servant's criminal acts.** A master is not, as a general rule, criminally responsible for the acts of his servants, unless he expressly command or personally co-operate with them. In criminal cases each must answer for his own acts, and stand or fall by his own behavior. *Rex* v. *Huggins*, 2 Strange, 882; S. C., 2 Ld. Raym. 1574; *Sturmy* v. *Smith*, 11 East, 25; *Sloan* v. *State*, 8 Ind. 312. See *Sweat* v. *Rogers*, 6 Heisk. (Tenn.) 117. But if a man does, by means of an innocent agent, an act which amounts to a felony, the employer and not the agent is accountable for that act. *Reg.* v. *Bleasdale*, 2 Carr. & K. 765. And see *Reg.* v. *Gruncell*, 9 Carr. & P. 356. So there are cases in which the act of the servant, having been within the usual scope of his employment, has been considered as having been done by the implied command of the master, and he has been held criminally responsible therefor. Thus the publishers and proprietors of newspapers and other publications have been held liable to criminal informations for libels published by their servants in the usual course of their employment, although personally, they had nothing to do with the publication of the libels. *Rex* v. *Almon*, 5 Burr. 2686; *Rex* v. *Baldwin*, 8 Ad. & El. 168; *Rex* v. *Walter*, 3 Esp. 21. And masters have been held liable to informations for penalties incurred by the breach of some statutory regulation by persons in their employ, although the masters themselves may have been entirely ignorant that in the particular instance any breach of the law had been committed. See *Attorney-General* v. *Siddon*, 1 Cr. & J. 226; *Rex* v. *Dixon*, 4 Camp. 12; S. C., 3 M. & S. 11; *State* v. *Wentworth*, 65 Me. 234; S. C., 20 Am. Rep. 688; *Goodhue* v. *Dix*, 2 Gray, 181. So, according to the English rule, masters are liable to indictment for public nuisances committed by their servants, although the masters have nothing to do *personally* with the nuisance complained of. *Tuberville* v. *Stampe*, 1 Ld. Raym. 264; *Rex* v. *Medley* 6 Carr. & P. 292; *Reg.* v. *Great North of England Railway Co.*, 9 Q. B. 315; Smith's Mast. & Serv. 148.

§ 10. **Servants of municipal corporations.** Municipal corporations are liable for the wrongful acts and neglects of their servants and agents done in the course and within the scope of their employment, in the same manner, and to the same extent, as natural persons.

Scott v. *Mayor, etc., of Manchester*, 37 Eng. Law & Eq. 495; *Clark* v. *Washington*, 12 Wheat. 40; *Meares* v. *Wilmington*, 9 Ired. (N. C.) 73; *Hildreth* v. *City of Lowell*, 11 Gray, 345; *Dayton* v. *Pease*, 4 Ohio St. 80; *Lee* v. *Village of Sandy Hill*, 40 N. Y. (1 Hand) 442; *Buffalo, etc., Turnpike Co.* v. *City of Buffalo*, 58 N. Y. (13 Sick.) 639. The difficulty usually experienced is in determining, in any particular case, whether the negligent employee is the servant of the municipality. As aiding in such determination, the distinction should be observed between an exercise of those legislative powers which a municipal corporation holds for public purposes, and as part of the government of the country, and those private franchises which belong to it, as a creature of the law. Within the sphere of the former, it enjoys the exemption of the government from responsibility for its own acts, and for the acts of those who are independent corporate officers, deriving their rights and duties from the sovereign power. *Eastman* v. *Meredith*, 36 N. H. 284; *Fisher* v. *Boston*, 104 Mass. 87; 6 Am. Rep. 196; *Maxmilian* v. *Mayor*, 62 N. Y. (17 Sick.) 160; S. C., 20 Am. Rep. 468; *Mead* v. *New Haven*, 40 Conn. 72; S. C., 16 Am. Rep. 14; *Elliott* v. *Philadelphia*, 75 Penn. St. 347; S. C., 15 Am. Rep. 591; *Ogg* v. *Lansing*, 35 Iowa, 495; S. C., 14 Am. Rep. 499. But where, in the exercise of those private franchises which belong to it as a creature of the law, it is responsible for the acts of those who are in law its agents, though they may not be appointed by itself. Id.; *Grimes* v. *Keene*, 52 N. H. 330; *Hardy* v. *Keene*, id. 370; *County Commissioners* v. *Duckett*, 20 Md. 468; *Prather* v. *Lexington*, 13 B. Monr. (Ky.) 559; *Alcorn* v. *Philadelphia*, 44 Penn. St. 348. And see *Oliver* v. *Worcester*, 102 Mass. 489, 499; S. C., 3 Am. Rep. 485, where this distinction is very clearly stated and illustrated. See *post*, title *Municipal Corporations*.

§ 11. **Servants of private corporations.** See vol. II, 72, 337. In respect to wrongs, the same rule is now applied to corporations as to individuals. The act of the agent is the act of the principal as much in one case as in the other. A corporation will, therefore, be liable for an injury done by its servants, if, under like circumstances, an individual would be responsible. *Turnpike Company* v. *Rutter*, 4 Serg. & R. 6; *First Baptist Church* v. *Schenectady, etc., R. R. Co.*, 5 Barb. 79; *Lee* v. *Village of Sandy Hill*, 40 N. Y. (1 Hand) 442; *Albert* v. *Savings Bank of Baltimore*, 1 Md. Ch. 407; *Bargate* v. *Shortridge*, 31 Eng. Law & Eq. 44; *Sharrod* v. *London Railway Co.*, 4 Exch. 585; *Beers* v. *Housatonic R. R. Co.*, 19 Conn. 566; *Michigan Central R. R. Co.* v. *Dolan*, 32 Mich. 510.

CHAPTER XCV.

MINES AND MINING.

ARTICLE I.

OF MINES AND MINERALS GENERALLY.

Section 1. Definition. Minerals are fossil bodies or matters dug out of mines or quarries, whence any thing may be dug. 2 Bouv. Law Dict. 180. The term "mineral" comprises all substances which now form, or which once formed, part of the solid body of the earth, both external and internal, and which are destitute of animal or vegetable life and incapable of supporting either. It embraces the bare granite of the loftiest mountain and the deepest hidden diamonds and metallic ores. *Earl of Rosse* v. *Wainman*, 14 M. & W. 859; S. C., 2 Exch. 800; 15 L. J. Exch. 67; *Micklethwait* v. *Winter*, 6 Exch. 644; S. C., 20 L. J. Exch. 313; 5 Eng. Law & Eq. 526.

A mine is an excavation in the earth for the purpose of obtaining minerals; and it may be either by excavating a portion of the surface, as is common in some classes of gold mines, or almost entirely beneath the surface. 2 Bouv. Law Dict. 180. It is the pit or excavation in the earth from which the ore is taken. The ore may extend indefinitely, but the mine is the pit from which it is extracted. *Shaw* v. *Wallace*, 1 Dutch. (N. J.) 453.

A reservation, in an act, of "mines and minerals within and under" lands, includes stone used for road-making and paving, and quarries, as well as underground mines. *Midland R. Co.* v. *Checkley*, L. R., 4 Eq. 19.

§ 2. **Ownership of minerals.** Mines of gold, silver and the precious stones belong to the sovereign (1 Plowd. 310; 3 Kent's Com. 378, *n.*); but they are held by him concurrently with the ownership of the soil, and pass by a grant of the land without exception or reservation. *Fremont* v. *Flower*, 17 Cal. 199. In most of the royal charters under which this country was settled the *grant* of the soil expressly includes "all mines," as well as every other thing included or borne in or upon it, reserving as a rent only, in the *reddendum*, one-fourth or one-fifth part of all the gold and silver ore, to be delivered at the pit's mouth, free of

charge. Bainb. Mines and Mining, *n.* pp. 37, 38. The rule seems now to be finally settled that to the owner of the soil, whether the government or a private individual, the minerals belong as a part of the land, and not to the government as an incident of sovereignty. *Ah Hee* v. *Crippen*, 19 Cal. 491; *Mining Co.* v. *Boggs*, 3 Wall. 304; S. C., 14 Cal. 279; *United States* v. *Castillero*, 2 Black (U. S.), 17; *United States* v. *Parrott*, 1 McAll. 271; *Fremont* v. *United States*, 17 How. (U. S.) 542. See *Goldhill Q. M. Co.* v. *Ish*, 5 Oreg. 104.

Prima facie, the owner of land is entitled to the surface itself, and all below it, *ex jure naturæ;* those who seek to derogate from that right must do so by some grant or conveyance. *Rowbotham* v. *Wilson*, 3 El. & El. 752; *Curtis* v. *Daniel*, 10 East, 273; *Barnes* v. *Mawson*, 1 M. & Sel. 84. But a mine may form a distinct possession and a different inheritance from the land. *Cullen* v. *Rich*, Bull. N. P. 102; S. C., 2 Str. 1142. And it is an occurrence quite common in mining districts for the ownership of the soil to be vested in one person, and that of the mines in another. *Stewart* v. *Chadwick*, 8 Clarke (Iowa), 463; *Adam* v. *Briggs Iron Co.*, 7 Cush. 361. And there may be distinct ownerships in different descriptions of mineral, and in different deposits or strata of the same kind of mineral. Thus, one person may be entitled to the iron, and another to the limestone; one seam or stratum of coal, in the same lands, may belong to a third person, and another distinct seam to a fourth owner. Bainb. 4, 5; *Ryckman* v. *Gillis*, 57 N. Y. (12 Sick.) 68; S. C., 15 Am. Rep. 464. Coal and mineral in place are land, and the owner of the mineral right has a hereditament distinct from the surface. *Caldwell* v. *Fulton*, 31 Penn. St. 475. But where there is not an *exclusive* right to dig all the coal, it is an incorporeal hereditament. *Dark* v. *Johnston*, 55 Penn. St. 164. Where the mineral in freehold lands is adversely claimed, the claim must be distinctly established against the owner of the surface. *Rowbotham* v. *Wilson*, 3 El. & El. 752. The rights of the grantee of the minerals depend on the terms of the deed by which they are conveyed; and under a grant of minerals a power to get them is a necessary incident. In the absence of documentary evidence, or in opposition to it, a title to minerals may be made out by proof of acts of ownership and length of possession. *Barnes* v. *Mawson*, 1 Maule & Selw. 77; *Desloge* v. *Pearce*, 38 Mo. 588. But reputation of ownership alone is not sufficient to repel the presumption of law in favor of the owner of the surface. It must be accompanied with a uniform usage and exercise of the right, resting on clear and indisputable facts. *Barnes* v. *Mawson*, 1 Maule & Selw. 77. But where there has once been a severance of the title to the surface from the title to the minerals below it, possession of

the surface, without proof of possession of the mineral strata, will not avail to establish title to the minerals by adverse possession. There should be possession of the mine or mineral strata as such. *Caldwell* v. *Copeland*, 37 Penn. St. 427; *Arnold* v. *Stevens*, 24 Pick. 106.

When the absolute title to streets is vested in the trustees of a town, and not merely an easement over them, for the use of the public, the trustees own the coal which is under the surface of such streets. *Hawesville* v. *Hawes*, 6 Bush (Ky.), 232.

When the surface and minerals belong to separate owners, the owner of the surface is *prima facie* entitled to the support of the subjacent strata; and the owner of the minerals is bound so to work the mines as to leave sufficient support for the surface; but these rights may be varied by express stipulation. *Smart* v. *Morton*, 30 Eng. Law & Eq. 385; *Marvin* v. *Brewster Iron Mining Co.*, 55 N. Y. (10 Sick.) 538; S. C., 14 Am. Rep. 322; *Coleman* v. *Chadwick*, 80 Penn. St. 81; 21 Am. Rep. 93; *Horner* v. *Watson*, 79 Penn. St. 242; S. C., 21 Am. Rep. 55; *Ryckman* v. *Gillis*, 57 N. Y. (12 Sick.) 68; S. C., 15 Am. Rep. 464.

By statute the mineral lands of the United States are open to purchase by the citizens, under the regulations prescribed by law and according to the local customs or rules of the mines in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States. See U. S. Rev. Stat., p. 427, § 2319. And there is no presumption of a grant in favor of the possessors of public lands as against a grantee of the United States. *Doran* v. *R. R. Co.*, 24 Cal. 245; *Fremont* v. *Seals*, 18 id. 433. But in a possessory action between persons, in any court of the United States, for the recovery of any mining title, or for damages to any such title, the fact that the paramount title to the lands in which such mines lie is in the United States, shall have no effect; but each case shall be adjudged by the law of possession. U. S. Rev. Stat., p. 171, § 910. See, also, *Hughes* v. *Devlin*, 23 Cal. 501.

An alien who has never declared his intention to become a citizen, is not a qualified locator of mining ground, and he cannot hold a mining claim either by actual possession or by location against one who connects himself with the government title by compliance with the mining law. *Golden Fleece* v. *Cable Consolidated Mining Co.*, 12 Nev. 312. See *Territory of Montana* v. *Lee*, 2 Mont. 124.

Possession of public mineral lands is good against strangers except where it is held and used by such possessor for grazing or agriculture and is entered upon *bona fide* for mining purposes. *Lentz* v. *Victor*, 17 Cal. 271; *Rupley* v. *Welch*, 23 id. 453.

Ore rights, when severed from the land and owned by tenants in common, are to be regarded as real estate. *Hartford, etc., Ore Co.* v. *Miller*, 41 Conn. 112.

§ 3. **Right to work mines.** "If a man hath land in which there is a mine of coals, or of the like, and maketh a lease of the land (without mentioning any mines) for life or for years, the lessee for such mines as were *open* at the time of the lease made, may dig and take the profits thereof. But he cannot dig for any *new* mines that were not open at the time of the lease made, for that should be adjudged waste, and if there be open mines, and the owner make a lease of the land, with the mines therein, this shall extend to the open mines only, and not to any hidden mine; but if there be no open mine, and the lease is made of the land together with all mines therein, there the lessee may dig for mines and enjoy the benefit thereof, otherwise those words should be void." Co. Litt. 54 *b.*; *Saunders' Case*, 5 Co. 12. And see *Freer* v. *Stotenbur*, 36 Barb. 641; *Findlay* v. *Smith*, 6 Munf. (Va.) 134; *Reed* v. *Reed*, 1 C. E. Green's Ch. (N. J.) 248. And if mines are already opened, or if the lease permits their being opened, the tenant may work them even to exhaustion. *Kier* v. *Peterson*, 41 Penn. St. 361. And if mining be the purpose of the lease, the tenant may mine, although he does not pay the rent. *Heil* v. *Strong*, 44 Penn. St. 264. He may open new pits for the purpose of pursuing the same veins which were open when he came into possession of the estate. *Clavering* v. *Clavering*, 2 P. Wms. 388; *Kier* v. *Peterson*, 41 Penn. St. 361. And a tenant for life without impeachment of waste may open and dig mines at his own pleasure. *Tracy* v. *Tracy*, 1 Vern. 23; *Aston* v. *Aston*, 1 Ves. 264. An estate by the curtesy and an estate in dower are estates for life, and the tenants, although punishable for waste, may, like other tenants, work open mines. *Stoughton* v. *Leigh*, 1 Taunt. 402. But it would seem that they should not, in such working, exceed a just proportion of the whole. See *Hastings* v. *Cruncleton*, 3 Yeates (Penn.), 261.

Coparceners, joint tenants, and tenants in common, may either effect a partition or concur in working or demising the mines for the common benefit. But any one of the owners may work or demise his or her own share without reference to the others. *Simpson* v. *Tellwright*, 2 Lutw. 1247; *Owen* v. *Morton*, 24 Cal. 373. A majority in interest, but not in numbers, cantrols the working of mines, but this power must be properly exercised for the benefit of all. *Dougherty* v. *Creary*, 30 Cal. 290. Those who do not co-operate may call the workers to an account and claim their proportion of the net profits. *Barnum* v. *Landon*, 25 Conn. 137.

The tenant in possession must pay a fair yearly rental. *Early* v. *Friend*, 16 Gratt. (Va.) 21. And his possession is the possession of all the co-tenants except when he does some decisive act amounting to an ouster of them. *Van Valkenburg* v. *Huff*, 1 Nev. 142. And if one tenant in common put a party in possession, his co-tenant cannot dispossess him, except upon notice or other act terminating the tenancy. *Ord* v. *Chester*, 18 Cal. 77. But a tenant in common may, as against a stranger, recover the entire premises in ejectment, but only his own proportion of the rents and profits. *Muller* v. *Boggs*, 25 Cal. 175; *Smith* v. *Starkweather*, 5 Day (Conn.), 207. See *Bullion Mining Co.* v. *Croesus, etc., Co.*, 2 Nev. 169. One tenant in common cannot so dispose of his interest in the soil to one person and his interest in the minerals to others, as to make his former co-tenant "divide the soil or general estate with one set of co-tenants and the mines and ores with another or many other sets of co-tenants." *Adam* v. *Briggs Iron Co.*, 7 Cush. (Mass.) 361.

A mortgagee in possession, unless he shows the security to be insufficient, has no right to open new mines. If he does work them he will be charged with all the receipts from the mines, without any allowance for the expenses in opening and working them. *Thorneycroft* v. *Crockett*, 16 Sim. 445; S. C., 2 H. L. Cas. 239.

As a general rule, the bare right to work mines will be accompanied with the right to use so much of the surface as is strictly necessary and reasonable to enable him to carry on mining operations. *Rogers* v. *Taylor*, 1 Hurl. & N. 706; S. C., 26 L. J. Exch. 203; 38 Eng. Law & Eq. 574; *Turner* v. *Reynolds*, 23 Penn. St. 199. But a person entitled to the minerals under the land of another, with license to make a mine shaft opening into it, is, in the absence of any stipulation to the contrary, under a legal obligation to the owner of the surface soil to fence the shaft so as to prevent its being a source of danger to his cattle which may be upon it; and is liable to an action for injury accruing to those cattle for want of such fencing. *In re Williams* v. *Groucott*, 4 B. & S. 149.

The Revised Statutes of the United States, pp. 427–434, regulate the locating and working of mining claims upon the public lands. These are governed, too, in some degree, by the local mining laws and customs, which constitute the American common law on mining for the precious metals. *King* v. *Edwards*, 1 Mont. 235.

And any citizen who is entitled to locate a lode on the public domain may perform all necessary acts of appropriation and development through the agency of others. *Murley* v. *Ennis*, 2 Col. T. 300. The authority of general agents in charge of mines will be recognized

without proof as covering all the ordinary local business of the concern; and persons dealing with them have a right, in the absence of notice to the contrary, to assume they have such power. *Adams Mining Co.* v. *Senter*, 26 Mich. 73.

The rules and customs of miners that require locators to do a certain amount of work upon their claims are conditions precedent; and the law presumes that such locators forfeit their rights to possess and mine the same by a failure to comply therewith, although no penalty is specified in such rules and customs. *King* v. *Edwards*, 1 Mon. T. 235.

Upon discovering a lode, the locator is entitled to a reasonable length of time in which to perfect the development which the local law requires. While holding possession for this purpose, his right to the lode is complete and cannot be conveyed except by deed. If the locator admits another to the possession with him, this will amount to an abandonment *pro tanto* and a re-taking by the party admitted, upon which they will become interested in the lode, jointly or otherwise, according to the terms of their agreement. In these particulars the rule is the same when applied to the re-location of an abandoned claim. *Murley* v. *Ennis*, 2 Col. T. 300. By the act of Congress of July 26, 1866, the general government extended to all in possession of mining claims, and to all subsequently locating and denouncing mines containing the precious metals, a guaranty of protection in their occupancy so long as the mines were operated. *Gold Hill Quartz Mining Co.* v. *Ish*, 5 Oreg. 104.

Where several, as tenants in common, locate a mining claim on the public lands, and by a failure to comply with the local mining laws forfeit the same, it may be re-located by a part of them along with others not interested in the first location; and those whose names are left out in the notice of re-location, cease to have any interest in the mine. *Strang* v. *Ryan*, 46 Cal. 33. And where the claim has been lost by reason of a failure to make the renewals of the notice required by the mining laws, and one of the joint locators afterward renews the location, stating that it is a renewal and not a new location, the renewal will inure to the benefit of all the locators. Id.

The owner and possessor of a mining claim on public land has a right to prevent any subsequent comer from erecting or constructing any superstructure, cut or ditch on his claim, unless the right to construct the same be given by some mining custom or regulation (*Correa* v. *Frietas*, 42 Cal. 339); or unless he shows a necessity therefor, and pays the damages. *Noteware* v. *Sterns*, 1 Mon. T. 311.

A notice of location of a mining claim is sufficient if placed in such

reasonable proximity and relation to the ledge, as in connection with the work done under it to give notice to all comers what ledge is intended. *Phillpotts* v. *Blasdel*, 8 Nev. 61.

The words "Pocotillo Mine" as used in a contract to designate certain mining ground therein specifically described do not apply to a larger tract of ground afterward known as the Pocotillo Mine. *Brandow* v. *Pocotillo, etc., Mining Co.*, 6 Nev. 169.

§ 4. **Rights of way, water, etc.** Though a right of way is necessarily incident to the right to work mines, yet necessity merely cannot *create* a right of way independently, of some former unity of ownership of the two parcels, or of an implication of a grant or reservation of such right, or of a right established by prescription. *Tracy* v. *Atherton*, 35 Vt. 52; *Ogden* v. *Grove*, 38 Penn. St. 487; *Gayford* v. *Moffatt*, L. R., 4 Ch. App. 133. Generally the right of way, if required, is expressly reserved in grants, and if way-leave to carry coals be reserved, the coal owner would have a right to lay such roads as would aid him most beneficially in the carriage of the coals. *Senhouse* v. *Christian*, 1 T. R. 560; *Dand* v. *Kingscote*, 6 M. & W. 196; *Bishop* v. *North*, 11 M. & W. 418; S. C., 12 L J. (N. S.) Exch. 362. And where the right is given to work all mines in a certain inclosure, with all convenient ways for those purposes, and for working and mining the mines and quarries belonging to the see of Durham, wheresoever situate, the grantee would be entitled to carry over the inclosed lands as well the minerals of those lands as those from any other mines of the see, but the right would not extend to the produce of any other mines. *Midgley* v. *Richardson*, 14 M. & W. 595; S. C., 15 L. J. (N. S.) Exch. 257.

If a lessor grant a way and afterward acquire a power to render that grant effectual, he cannot be allowed to defeat it. *Newmarch* v. *Brandling*, 3 Swanst. 99.

When a wagon or other way has been used for mining purposes, no right of way will be acquired by private persons, or by the public during such user by any lapse of time, as an enjoyment of that kind will not be as of right. *Arkwright* v. *Gell*, 5 M. & W. 203. And when a right of way or any other easement is granted for purposes partly connected with land and partly for other extraneous purposes, the right to the former only is capable of transfer to subsequent purchasers. *Ackroyd* v. *Smith*, 19 L. J. (N. S.) C. P. 315; S. C., 10 C. B. 164. If such a grant or license be given by deed, it is revocable on breach of the agreement. *Barraclough* v. *Johnson*, 8 Ad. & El. 99. If not given by deed, it is revocable without cause, at any time. *Newmarch* v. *Brandling*, 2 Swanst. 99.

Special rights may exist in the use of water, by the consent of those having the same equality of right, shown either by actual grant or license, or by prescription founded on uninterrupted enjoyment. *Baxendale* v. *McMurray*, L. R., 2 Ch. 790; *McCullum* v. *Water Co.*, 54 Penn. St. 40; *Sampson* v. *Burnside*, 13 N. H. 264; *Babcock* v. *Utter*, 1 Keyes (N. Y.), 397; S. C., 32 How. 439. These rights will be strictly guarded within their allowed limits, and any new purpose or use, which may sensibly aggravate the previous disturbance, cannot be engrafted on any former acquired right. *Brown* v. *Best*, 1 Wils. 174; *Bealey* v. *Shaw*, 6 East, 208; *Wood* v. *Sutcliffe* 2 Sim. (N. S.) 163; S. C., 8 Eng. L. & Eq. 217; *McCullum* v. *Germantown Water Co.*, 54 Penn. St. 48.

A lessee of mines with a general right to use surface-water cannot claim the water of a stream flowing along the boundary of the lands as a proprietary right. *Insole* v. *James*, 1 Hurl. & N. 243; S. C., 37 E. L. & Eq. 523. But a right to discharge water which had been used for the precipitation of minerals and rendered noxious may be gained by user. *Wright* v. *Williams*, 1 M. & W. 77. And the right to throw refuse from mines into a natural stream may be asserted either by prescription or by custom. *Carlyon* v. *Lovering*, 1 Hurl. & N. 784; S. C., 26 L. J. Exch. 251; 40 E. L. & Eq. 448.

If an artificial stream has been used and enjoyed in such a manner, and for such a time, as would give adverse riparian rights in the case of a natural stream, the same rights may be acquired in the artificial stream. *Sutcliffe* v. *Booth*, 32 L. J. Q. B. 136; *Gaved* v. *Martyn*, 19 C. B. (N. S.) 732; S. C., 34 L. J. C. P. 353.

The mining ditches of those parts of the United States where the precious metals are mined may be classed under the head of artifical water-courses. The doctrine of the common law, declaratory of the rights of riparian proprietors respecting the use of running waters, are inapplicable, or applicable only in a very limited extent to the neccessities of miners and inadequate to their protection; their prior appropriation gives the better right to running waters to the extent, in quantity and quality, necessary for the uses to which the water is applied. *Atchison* v. *Peterson*, 20 Wall. 508; *Union Water Co.* v. *Crary*, 25 Cal. 505; *Lobdell* v. *Hall*, 3 Nev. 507. But such prior right does not give the exclusive use of the channel. *Butte, etc., Co.* v. *Vaughn*, 11 Cal. 143. And the first appropriator has, by virtue of his appropriation, the right to the use and enjoyment of the water as against other claimants, only to the extent of his original appropriation. *Hill* v. *Smith*, 27 Cal. 476; *Lobdell* v. *Simpson*, 2 Nev. 274. And his right to the continued use of the water for the purpose for

which he first appropriated it, is violated by any deterioration of its *quality* for such purpose. *Bulte, etc., Co.* v. *Vaughn*, 11 Cal. 143. He must use it so as not to injure orchards and gardens along the stream, which were inclosed and planted before the water was appropriated. *Wixon* v. *Bear River, etc., Co.*, 24 Cal. 367. The owner of a saw-mill upon a stream, the waters of which are used under a prior appropriation for mining purposes, will not be permitted unnecessarily to throw saw-dust into the water. *Water Co.* v. *Fletcher*, 23 Cal. 481. And how far a mining custom to let tailings run free down a gulch without any hindrance can interfere with and destroy the mining operations and ground of persons locating for mining purposes in the same gulch below, and after such custom or regulation has been established is determined in *Lincoln* v. *Rodgers*, 1 Mon. T. 217.

The prior appropriator of water for mining purposes at a certain point can extend his ditch and use the water to the extent of his appropriation, at any other point, for the same or a different purpose. *Woolman* v. *Garringer*, 1 Mon. T. 535.

As between ditch-owners and miners using the waters of a stream for mining purposes, the law does not tolerate the smallest amount of injury by one to the prior rights of another. *Hill* v. *Smith*, 27 Cal. 476. But where the head of the plaintiff's ditch was fifteen miles below the defendant's mining ground, yet the plaintiff could not have an injunction restraining the defendant from working the ground, although the plaintiff was the first appropriator, and the defendant's working the ground caused him some expense. *Atchison* v. *Peterson*, 1 Mon. T. 561. Ditch property is real estate (*Clark* v. *Willett*, 35 Cal. 534); and the conveyance of a mining ditch is not to be regarded as a grant of a mere easement or incorporeal hereditament. *Reed* v. *Spicer*, 27 Cal. 57. The continued adverse uninterrupted possession, use and enjoyment, for five years, of water used for mining purposes, is sufficient to justify the presumption of a grant. *Union Water Co.* v. *Crary*, 25 Cal. 504.

Where a mining company owns a mining claim and buys a water ditch "and the water rights thereto appertaining," they do not necessarily become appurtenances of the mining claim; and where the ditch leads out of a creek, a portion of whose waters are used in working the above claim, it does not follow that the ditch is rendered such an appurtenance. *Quirk* v. *Falk*, 47 Cal. 453.

Miners are bound in the use of their ditches to such care to prevent injury to others as prudent persons employ in the conduct of their own affairs. *Campbell* v. *Bear River, etc., Co.*, 35 Cal. 679. And

they are, in respect of such ditches, liable only for wanton injury or gross negligence. *Tenney* v. *Miner's Ditch Co.*, 7 Cal. 335.

§ 5. **Transfer of mines.** No precise form of words is necessary in a bill of sale for a mining claim. If it be clear from the language, that the maker intended to pass the title to the property, the law will, if possible, so construe the words used as to effectuate that intent. And the owner may give away the claim by a written bill of sale, and the latter is not to be rejected as evidence, because it was a gift. *Meyers* v. *Farquharson*, 46 Cal. 190.

Mines, forming part of the general inheritance, will be transferred along with the land without being expressly mentioned in the conveyance. *Keyse* v. *Powell*, 2 E. & B. 132; S. C., 22 L. J. Q. B. 305. But, if they form a distinct possession, a distinct title to them must also be established; and, at all events, the minerals beneath the surface of a tract of land may be conveyed by deed, distinct from the right to the surface. *Caldwell* v. *Fulton*, 31 Penn. St. 475; *Melton* v. *Lambard*, 51 Cal. 258.

When mines have been vested in an executor, without any special directions with respect to them, or pass to the administrator by operation of law, these personal representatives will have full power to dispose of them, without reference to the fact of their being classed amongst property of a perishable and uncertain nature. Bainbridge, 136; *Garrett* v. *Noble*, 6 Sim. 504.

Mines held in fee, which are opened, are liable to dower. *Billings* v. *Taylor*, 10 Pick. [Mass.] 460; *Coates* v. *Cheever*, 1 Cow. 460; *Moore* v. *Rollins*, 45 Me. 493; *Rockwell* v. *Morgan*, 2 Beas. Ch. [N. J.] 384); and, if a husband be possessed of several different mines, it is not necessary that the sheriff should divide each of them, but he may assign such a number of them as may amount to one-third in value of the whole. *Stoughton* v. *Leigh*, 1 Taunt. 402.

Partition of land containing an ore bed, the extent, depth and richness of which was unknown, has been refused. *Conant* v. *Smith*, 1 Aik. (Vt.) 67; *De Witt* v. *Harvey*, 4 Gray, 486. If one of two co-tenants convey his undivided interest in the soil to one person, and his undivided interest in a mine therein to a different person, neither of these grantees can compel the remaining original co-tenant to make partition. *Adam* v. *Briggs Iron Co.*, 7 Cush. 361; *Boston, etc., Co.* v. *Condit*, 4 C. E. Green's Ch. (N. J.) 395.

Shares of mines held on the "cost book principle" may be transferred by parol, and in this respect there is no distinction between incorporated and unincorporated companies. *Watson* v. *Spratley*, 10 Exch. 222; S. C., 24 L. J. Exch. 53; *Edwards* v. *Hall*, 25 L. J. Ch.

82; S. C., 6 DeG., M. & G. 74; 11 Hare, 6; *Marshall* v. *Bown*, 7 M. & G. 193.

The implements, tools and movable goods employed for mining purposes, form an independent personal property and will not be transferred together with the property in the mines, or the right to work them. *Fisher* v. *Dixon*, 12 Cl. & Fin. 312. A mining tenant may remove an engine, etc., *during the term*, but not *after the term is ended* although terminated by a forfeiture under the terms of the lease. *Davis* v. *Moss*, 38 Penn. St. 346; *Merritt* v. *Judd*, 14 Cal. 59.

In a deed of land by a corporation containing a bed of iron ore, a right reserved "of mining on the granted premises for the use of said company," a certain quantity of ore, is assignable, and not subject to limitation or suspension by intrinsic evidence that the corporation was chartered to manufacture iron only in certain furnaces, and work mines for its own use, and that at the time of the deed it expected and intended to discontinue business. *Stockbridge Iron Co.* v. *Hudson Iron Co.*, 107 Mass. 290. And a deed conveying a lot in fee-simple, "also the right of digging for coal under the adjoining land lying east of said lot," with habendum corresponding (though reserving a certain right of ferry), and covenants of warranty of the lot conveyed, "with the right of digging for coal as aforesaid," conveys an absolute property in the coal, and an exclusive right to mine, and remove the same. *List* v. *Cotte*, 4 W. Va. 543.

§ 6. **Sales of mines and shares.** If a purchaser takes possession of mines, and manages the property under a contract, stipulating that a good title should be made by a specified future day, and it appears to be the intention of the parties that the purchaser should immediately take possession, there will be no waiver of objections on the part of the purchaser. *Stevens* v. *Guppy*, 3 Russ. 171.

If one, knowing there is a mine in the land of another, of which he knows that other to be ignorant, should, concealing the fact, enter into a contract to purchase the land for a price which the estate would be worth without considering the mine, the contract would be good because the buyer is not obliged from the nature of the contract to make the discovery. *Fox* v. *Mackreth*, 2 Bro. C. C. 420; *Harris* v. *Tyson*, 24 Penn. St. 347. And see *Rockafellow* v. *Baker*, 41 id. 321.

§ 7. **Lease of mines.** The greater portion of the mines and mineral districts are working under leases, and much difficulty frequently arises from the intersection of mineral veins which have been leased to different parties. In some cases it is exceedingly difficult to ascertain the identity of a vein; and sometimes the vein may be improperly or imperfectly described in the grant. Bainb. 198. The description should

be clear and intelligible, and in case of doubt it must be left to a jury to determine in whose favor the evidence preponderates. *Davis* v. *Shepherd*, 35 L. J. Ch. 581.

A mining term may also be explained in accordance with the rule relating to mercantile transactions. *Hutchinson* v. *Bowker*, 5 M. & W. 535. And in some cases extrinsic evidence may be admitted to supply omissions in mining agreements. *Hutton* v. *Warren*, 1 M. & W. 474; *Wigglesworth* v. *Dallison*, 1 Doug. 201. But a general dictionary is not sufficient evidence of meaning derived from local usage. *Houghton* v. *Gilbart*, 7 C. & P. 701. And parol evidence is admissible to explain latent ambiguities, local terms and terms of art in writings, but not where none of these reasons exist (*Fisher* v. *Deibert*, 54 Penn. St. 460); and such evidence not inconsistent with a written instrument is admissible to apply the instrument to its subject. *Noonan* v. *Lee*, 2 Black (U. S.), 499; *Colbourn* v. *Dawson*, 10 C. B. (70 Eng. C. L.) 765.

As a rule, conditions in a lease that work a forfeiture are not to be favored. *McKnight* v. *Kreutz*, 51 Penn. St. 232; *Bell* v. *Bed Rock, etc., Co.*, 36 Cal. 214. But if the lessee of a mine stipulates that he will pay a rent for coal taken from the mine, and also names a certain number of tons annually, although a settlement is had for all coal taken out, this will be no discharge for a breach of the contract in not taking out the stipulated quantity. *Powell* v. *Burroughs*, 54 Penn. St. 329. But a clause in a mining lease that the lessee shall commence operations by a certain date, is not a condition, the non-performance of which determined his rights or worked a forfeiture. The time so fixed is of the essence of the contract only so far as to enable the lessor after its expiration to maintain an action for non-performance of the stipulation. *Barker* v. *Dale*, 3 Pittsb. (Penn.) 190. If a lease provide that if the bank should stand by the act of the lessee, "when it would yield coal, for the term of one year, it should be taken as an abandonment of the lease," and also that the lessee should put the bank in order, for the rent of the first year, the clause of forfeiture does not apply to the first year of the term. *Moyers* v. *Tiley*, 32 Penn. St. 267.

Under a mining rule that requires the claimant to work the claim for two days in every ten, if the claimant leaves the work for the purpose of obtaining machinery, and with the intention of returning, the procuring of machinery is work upon the claim, and consequently there is no forfeiture. *Packer* v. *Heaton*, 9 Cal. 568.

A mining lease of an exclusive right to mine upon the "Watkins range or works," on the lessor's land, conveys a right not only to mine on the said range as far as it had been actually opened and worked, but

also to follow it to the limits of said land. But the lease does not convey the exclusive right to work a vein on another portion of said tract, between which and the former no connection existed within the said tract; and this conclusion is not affected by the fact that the ores in the "Watkins range" were in a horizontal seam. *Sobey* v. *Thomas*, 39 Wis. 317.

The lessors of a coal vein are liable as co-trespassers for the act of their tenant in mining coal in the land of an adjoining owner; they having leased the particular vein of coal authorized the sinking of the slope by which it was reached, and contributed to the expense, believing that it would not extend beyond their own line; and the tenant having by the means of this slope taken out coal from the adjoining property and paid for the greater part of it to his lessors, a certain rent for each ton of coal mined by him. *Dundas* v. *Muhlenberg*, 35 Penn. St. 351.

Parties to a mining lease must be held to have contracted with reference to the state of things existing at the time the lease was made. *Williams* v. *Summers*, 45 Ind. 53

The lessee, although entitled to rely on the existence of the subject matter, takes all risk of its failure, either as to quantity or value, unless either is expressly warranted. *Gowan* v. *Christie*, L. R., 2 Sc. App. 273; S. C., 5 Eng. R. 114. What is termed "a mineral lease" is really a sale out and out of a portion of the land. *Dicta* which are, therefore, applicable to agricultural leases are not always applicable to leases of minerals. Id. A lease which gives the right to take out all the coal beneath a certain surface confers also the right to make all necessary openings to reach the coal. *Trout* v. *McDonald*, 83 Penn. St. 144.

§ 8. **License to work mines.** There is a marked distinction between a lease of mines and the right to work mines. The former is such a corporeal interest in lands as is a proper subject of ejectment. *Barker* v. *Dale*, 3 Pittsb. (Penn.) 190; *Stewart* v. *Chadwick*, 8 Clarke (Iowa), 463. The latter is a mere incorporeal hereditament or right to be exercised in the land of others. *Chicago, etc., Oil, etc., Co.* v. *U. S. Pet. Co.*, 57 Penn. St. 83. This right may be held apart from the possession of the land, and in this respect it differs from those incorporeal rights called easements. *Big Mountain, etc., Co.'s Appeal*, 54 Penn. St. 361; *Cobb* v. *Davenport*, 3 Vroom (N. J.), 389. Under a license, the grantee acquires no property in the minerals until they are severed from the land, and have thus become liable to be recovered in an action of trover. *Grubb* v. *Bayard*, 2 Wall., Jr., 81; *Caldwell* v. *Fulton*, 31 Penn. St. 475; *Cook* v. *Stearns*, 11 Mass. 534; *Clute* v. *Carr*, 20 Wis. 531.

A license to work mines can only be granted by deed. *Dark* v. *Johnston*, 55 Penn. St. 164; *Mumford* v. *Whitney*, 15 Wend. 380; *Wilson* v. *Chalfant*, 15 Ohio, 248. And it cannot be revoked. *Wood* v. *Manley*, 11 Ad. & E. 34; *Funk* v. *Haldemann*, 53 Penn. St. 229; *Bracken* v. *Rushville, etc., Co.*, 27 Ind. 346. A parol license of mining lands can only be terminated by compensation to the licensee, or by the notice necessary to terminate a tenancy at will. Such license is good as against a subsequent lessee or licensee, with notice. *Harkness* v. *Burton*, 39 Iowa, 101. But one who has only a liberty to dig coals in another's soil has not an exclusive right to the coal, and cannot maintain trover against the owner of the estate for coals raised by him. *Chetham* v. *Williamson*, 4 East, 469. Hence an exclusive right to minerals will not necessarily be conferred by the grant of a license to work them. *Funk* v. *Haldeman*, 53 Penn. St. 229; *Carr* v. *Benson*, L. R., 3 Ch. App. 524.

Possession of land is not necessary to enable the owner of an incorporeal hereditament to maintain an action on the case for its disturbance. *Union Petroleum Co.* v. *Bliven Petroleum Co.*, 72 Penn. St. 173.

A "register" signed by the agent of the proprietors of a mine, and by miners whose ten years' lease had just expired, as follows: "Those whose signatures are hereto annexed are permitted to mine on the Mine La Motte Domain, and raise any mineral contained under the surface thereof conditionally that they sell no ores thus raised to any other person than such as will smelt the same on the said domain. This agreement to be subject to and revokable by the future action of the proprietors," is not a lease but a license, and a subscriber, who, after its revocation by the proprietors, extracted minerals without their consent, was a trespasser. *Lunsford* v. *LaMotte Lead Co.*, 54 Mo. 426. And such trespasser, if insolvent, may be enjoined and required to discontinue the acts of trespass. *Lockwood* v. *Lunsford*, 56 Mo. 68.

§ 9. **Mining, partnerships and companies.** An unincorporated mining association is a tenancy in common merely (*Wiseman* v. *McNulty*, 25 Cal. 230); or a common partnership. *Penn. Mining Co.* v. *Owens*, 15 Cal. 135. And where a person, claiming to be in possession of public lands, makes a verbal agreement with others that the latter should prospect and when they found coal it should be worked jointly, the former bearing one-third of the expense, the relation thence arising is not that of landlord and tenant but of tenants in common, or of partners in a mining partnership. *Henderson* v. *Allen*, 23 Cal. 519; *Putnam* v. *Wise*, 1 Hill, 234. If the land is not intended to be held in common, but is to remain the absolute property of any one or

more of the parties, a case of commercial partnership can fairly be presumed with respect to all concerned. *Mears* v. *James*, 2 Nev. 342. And an equal interest in a mine acquired by agreement with the person intending to and who does become the lessee, entitles the party having such equal interest, as between him and the lessee, to a corresponding share of the profits of the mine. *Settembre* v. *Putnam*, 30 Cal. 490.

"Owners and shareholders" in a mine are not copartners for the purpose of prospecting or working a mining claim within the meaning of the California act (1865–6, p. 828). *Brundage* v. *Adams*, 41 Cal. 619.

A necesary incident of a mining corporation is, that it shall have power to contract and to bind itself to those dealing with it in matters within the intent of the charter, even though the charter contains no express agreement or power to contract or make debts. *Wood Hydraulic Hose Mining Co.* v. *King*, 45 Ga. 34.

The superintendent of a mining company has no authority, by virtue of his office merely, to borrow money on the credit of the corporation. The president of the corporation has no authority, as such, to undertake in the corporate name for the repayment of such an unauthorized loan. *Union Gold Mining Co.* v. *Rocky Mountain Nat. Bank*, 2 Col. T. 565. Nor can a superintendent, by virtue of his position, without the knowledge or consent of the corporation, change the terms of a written contract made by the board of trustees. *Lonkey* v. *Succor M. & M. Co.*, 10 Nev. 17. And if he makes notes to bind the corporation, without authority, such notes are void and their assignment does not operate as an assignment of the indebtedness for which they were given. *Carpenter* v. *Biggs*, 46 Cal. 91. The law will not imply an authority in him to make a promissory note binding on the company, even though it be given for the payment of lumber or other articles for the use of the mine. *Skillman* v. *Lachman*, 23 Cal. 198; *Gillig* v. *The Lake Bigler R. R. Co.*, 2 Nev. 214.

Shareholders cannot, by any agreement among themselves, authorize a manager to recover calls from defaulters, by an action at law. There is no privity of contract and no consideration. *Hybart* v. *Parker*, 4 C. B. (N. S.) 209; S. C., 27 L. J. C. P. 120.

Each member of a mining copartnership may bind the other members for what is useful and necessary in their undertaking, unless there is an express agreement to the contrary, of which the party contracting with the members of the firm had notice. *Nolan* v. *Lovelock*, 1 Mon. T. 224. But they cannot bind each other or authorize others to do so, by drawing or accepting bills of exchange, or by giving promissory notes in the absence of stipulation or usage. *Ex parte Bonbonus*, 8

Ves. 540; *Ex parte Nolte*, 2 G. & J. 295; *Ex parte Bowness*, 2 M. & S. 484; *Duncan* v. *Lowndes*, 3 Camp. 478. But a partner may be made liable on bills of exchange, by his own conduct in any particular transaction. *Owen* v. *Van Uster*, 10 C. B. 318; 20 L. J. C. P. 61; *Healey* v. *Story*, 3 Exch. 3.

In a suit to recover money collected by one joint-owner as the profit of an interest in a water ditch, the business should be regarded as a partnership, and the money received by the defendant as money had and received for the plaintiff's use. *Abel* v. *Love*, 17 Cal. 233. And where certain persons subscribe money toward building a quartz mill in which all the subscribers were to be interested, and the subscription paper, without naming any payee, provides that the money should be paid in such manner and at such time as the majority of the subscribers might order, the subscription is for the mutual benefit of all the subscribers. *Wheeler* v. *Floral Mill, etc., Co.*, 9 Nev. 254.

The legal title to mining stock, except as between the parties, can only be acquired by transfer upon the books of the corporation. *State* v. *Pettineli*, 10 Nev. 141.

A statute which authorizes lands to be received as money in payment of subscriptions to the capital stock of a mining company does not apply to leasehold interests. *Basshor* v. *Dressel*, 34 Md. 503.

Partnership in mines, like common partnerships, although carried on for specific purposes, in connection with the enjoyment of certain interests in land, and with a limited and definite object, is subject to a dissolution by notice or mere verbal agreement, or by death, bankruptcy, sale of copartnership effects under a separate execution, outlawry or attainder of a copartner, or the marriage of a *femme sole*. Bainb. 317. And see *Crawshay* v. *Maule*, 1 Swanst. 495; S. C., 1 Wils. 181. But one partner may convey his interest in the mine and business without dissolving the partnership. *Duryea* v. *Burt*, 28 Cal. 569.

In an action by three mining partners against a fourth for a dissolution and a conveyance to them of their interests in a specific area located in his name, the fact that they have conveyed to him all the interests located in their names constitutes no defense. *Welland* v. *Huber*, 8 Nev. 203.

Partners are liable for trespasses by each other, and by their agents or servants, committed in the legitimate conduct of the partnership business. *McKnight* v. *Ratcliff*, 44 Penn. St. 156.

The passive acquiescence of one partner in the sale of the interest of his copartner by one having no title cannot avail to confer title upon the vendee. *Waring* v. *Crow*, 11 Cal. 366.

The only partition that the court can make of the water of a mining

ditch is to order a sale and distribute the proceeds. *McGillivray* v. *Evans*, 27 Cal. 92. In Nevada, partition can be made of a mining claim, and when objection is made to the sale, no other course can, under the statute, be pursued. *Dall* v. *Confidence Silver Mining Co.*, 3 Nev. 531.

An agreement made between parties, by which some of them prospect for gold, and the others furnish money and provisions, for which they are to receive interests in the mining grounds that may be discovered, constitutes a *prospecting partnership;* and those who furnish the money and provisions are entitled to pre-empt and hold mining claims under the laws of a district, which provide that claims shall be allowed the discoverers for their prospecting partners. *Boucher* v. *Mulverhill*, 1 Mont. 306. A mining prospecting partnership is not governed by the technical rules of the law of commercial partnership. Id.

§ 10. **Injuries to mines.** The right of support claimed by an owner of the surface is distinct from any right to compensation claimed under the ordinary terms of a grant or exception of mines, and any such specific stipulation will not defeat the right to support, unless it is expressly included. *Harris* v. *Ryding*, 5 M. & W. 60; S. C., 8 L. J. (N. S.) Exch. 181; *Wakefield* v. *Duke of Buccleugh*, L. R., 4 Eq. 613; S. C., 4 H. L. Cas. 377. And see *Marvin* v. *Brewster Iron, etc., Co.*, 55 N. Y. (10 Sick.) 538; S. C., 14 Am. Rep. 322. The right to vertical support is a presumptive right at common law arising from the possession of the surface. *Rogers* v. *Taylor*, 2 Hurl. & N. 828; S. C., 27 L. J. Exch. 173. And in every demise of minerals where the surface is retained by the lessor, it is a presumption of law in the absence of expressions of a contrary tenancy that he reserves to himself the right to support. *Dugdale* v. *Robertson*, 8 Kay & J. 695. The usual clause that the mine-owner shall do as little damage as possible to the soil does not operate in restraint of that right of support. *Proud* v. *Bates*, 34 L. J. Ch. 406; S. C., 39 Eng. L. & Eq. 19.

Mining operations may produce injury to the adjoining lands belonging to other owners, without any actual trespass on them, and particularly to buildings. *Popplewell* v. *Hodkinson*, L. R., 4 Exch. 248; *Thurston* v. *Hancock*, 12 Mass. 220; *Moody* v. *McClelland*, 39 Ala. 45. But if an owner builds upon his lands so near to that of another that the latter cannot, on that account, have the full enjoyment of his land without injuring his neighbor's building, he will not be liable to an action for such an injury, even if he has not used ordinary care in his labor. *Farrand* v. *Marshall*, 21 Barb. 409; *Richardson* v. *Railroad Co.*, 25 Vt. 465; *Charless* v. *Rankin*, 22 Mo. (1 Jones) 566.

Frequent injuries to mines arise from inundations. The law relating to this subject is rational and is founded on the principle that each owner has the full right to extract the greatest possible benefit from his property, and that, if, in so doing, he injure his neighbor, he will not be liable to an action if his acts spring from no malice, or mischief, and are simply consistent with a reasonable exercise of his own rights. See *McKnight* v. *Ratcliff*, 44 Penn. St. 156; *Clark* v. *Willett*, 35 Cal. 534. He will not be liable to the owner of an adjacent mine for an injury occasioned to such adjacent mine, where such injury proceeds from natural causes, in themselves beyond his control, though his own acts may have conduced to produce the injury, if his acts have only been those of the proper and ordinary working of his own mine without default or negligence. *Smith* v. *Kenrick*, 7 C. B. 505; 18 L. J. (N. S.) C. P. 172; *Fletcher* v. *Rylands*, 3 Hurl. & Colt. 773. But where, for his own convenience, he diverts the course of a stream, he must take care that the new course provided for it shall be sufficient to prevent mischief from an overflow, so that, even if that overflow should be directly and mainly occasioned by an act of nature, his own conduct in not so forming the new and diverted course for the stream, of form and of sufficient capacity to carry off an accidental overflow of water, even of an exceptional kind, will be matter of consideration in determining the question of his liability. *Fletcher* v. *Smith*, L. R., 2 App. Cas. (H. L.) 781.

The owner of a mine on a higher level than an adjoining mine has a right to work the whole mine in the usual and proper manner, for the purpose of getting out any kind of material in any part of the mine, and is not liable for any water which flows by gravitation into an adjoining mine from works so conducted. But he has no right to be an active agent in sending water into the lower mine. *Baird* v. *Williamson*, 15 C. B. (N. S.) 376; S. C., 33 L. J. C. P. 101; *Tillotson* v. *Smith*, 32 N. H. 90. And in Pennsylvania it is said that he must use reasonable diligence to prevent the flow of water from his mine into the lower one. *Locust Mountain Coal, etc., Co.* v. *Gorrel*, 9 Phil. (Penn.) 247.

The owner of a mining claim comprising the bed of a canon may erect dams across the bed thereof to enable him to work the same, even if thereby other mining claims on the banks of the canon are flooded, provided his claim is the oldest location, and in such case the injury sustained by the owner of the bank claim is *damnum absque injuria*. *Stone* v. *Bumpus*, 46 Cal. 218.

And the grantee of minerals beneath the surface is not liable to the owner of the surface for the loss of springs occasioned by the ordin-

ary working of the mine. *Coleman* v. *Chadwick*, 80 Penn. St. 81; S. C., 21 Am. Rep. 93. See, also, *Trout* v. *McDonald*, 83 Penn. St. 144.

The right of the owner of lands to the enjoyment thereof is qualified by the rights of others. He may pursue any lawful trade thereon, but he cannot create a nuisance to the premises of another. In the prosecution of his own works he has no right to blast rocks so as to cast them upon the premises of another. *Hay* v. *The Cohoes Company*, 2 N. Y. (2 Comst.) 159. The true rule in regard to streams of running water is, that without regard to priority of location, each person mining on the same stream, is entitled to use in a proper and reasonable manner, both the channel of the stream and the water flowing therein. The question of reasonableness of the use is for the jury. *Esmond* v. *Chew*, 15 Cal. 137. And one may be restrained from throwing sawdust into a stream previously appropriated for mining purposes. *Phœnix Water Co.* v. *Fletcher*, 23 Cal. 481; *Lewis* v. *Stein*, 16 Ala. 214; *Holsman* v. *Boiling Spring, etc., Co.*, 1 McCart. (N. J.) 335; *Gerrish* v. *Brown*, 51 Me. 256. And the first locators of mining ground have no right, by custom or otherwise, to allow tailings to run free in the gulch, and render valueless the mining claims of subsequent locators below them. *Lincoln* v. *Rodgers*, 1 Mont. 217; *Nelson* v. *O'Neal*, id. 284. But the right to throw refuse from mines into a natural stream may be asserted either by prescription or by custom. *Carlyon* v. *Lovering*, 26 L. J. Exch. 251; S. C., 1 Hurl. & N. 784; 40 Eng. L. & Eq. 448. A continued user for twenty years will legalize a private nuisance. *Elliotson* v. *Feetham*, 2 Bing. N. C. 134; *Wright* v. *Williams*, 1 M. & W. 77. See *post*, tit. *Nuisances*.

§ 11. **Actions at law.** An action of trespass may be maintained in respect of any improper interference with the enjoyment of mines in all those cases in which that remedy is generally applicable. *Shaw* v. *Wallace*, 1 Dutcher (N. J.), 453. This action is usually resorted to for trying the validity of a title. *Bourne* v. *Taylor*, 10 East, 189; *Lord Feversham* v. *Emerson*, 24 L. J. (N. S.) Exch. 254. The lessor of a mine may maintain an action of trespass on the case against his lessee, for an injury to his reversion, by an improper working of the mine. *Marker* v. *Kenrick*, 13 C. B. 188; S. C., 22 L. J. (N. S.) C. P. 129; *McDonnell* v. *M'Kinty*, 10 Irish L. R. 514.

A lessee, under an oral lease, which permits him to enter and take away ores from land, for a certain rent in kind, thereby acquires an interest in the land, that enables him to maintain trespass against third persons for mining therein. *Ganter* v. *Atkinson*, 35 Wis. 48.

The lessor of a mine may recover as damages from one who has wrongfully taken ore from his mine, the value of the ore when less per ton

than the royalty per ton paid by the lessee, estimated as the ore lay in the bed, and not as it was after its value had been increased by the trespasser's raising it to the surface. *Stockbridge Iron Co.* v. *Cone Iron Works*, 102 Mass. 80.

In an action of trespass for the breaking of a dam, whereby the workmen were driven from the mines by the water, evidence of the amount each miner would produce, and of the expense of keeping the mules employed in the mines whilst the mines could not be worked, is admissible in considering the question of damages. *Douty* v. *Bird*, 60 Penn. St. 48.

An action of ejectment may be maintained to recover the possession of a mine. *Comyn* v. *Kyneto*, Cro. Jac. 150; *Cullen* v. *Rich*, Bull. N. P. 102; *Whittingham* v. *Andrews*, Carth. 277; S. C., 1 Salk. 255. All the rights and easements enjoyed with mines may be recovered with the subject-matter of which they are deemed to form a part. *Crocker* v. *Fothergill*, 2 B. & Ald. 661. But an action of ejectment will not properly lie in respect of a license only to work mines. *Doe d. Hanley* v. *Wood*, 2 B. &. Ald. 739; *Beatty* v. *Gregory*, 17 Iowa, 109; *Shaw* v. *Wallace*, 1 Dutcher (N. J.), 453.

When minerals are severed, they are mere personal chattels, and an action of trover is maintainable for their recovery in that condition. *Grubb* v. *Bayard*, 2 Wall. Jr. (C. C.) 81. And, although the title to mineral lands may remain in the United States, the ores, when dug or detached from the lands under a mining claim, are free from any lien, claim or title of the United States, and, becoming personal property, are, as such, subject to State taxation, in like manner as other personal property. *Forbes* v. *Gracey*, 94 U. S. (4 Otto) 762.

The general rule in ejectment suits, that the plaintiff must rely on the strength of his own title, is not applicable to suits concerning mining claims, for neither party has any legal title, strictly speaking. *Richardson* v. *McNulty*, 24 Cal. 339. In such action, if the plaintiff shows prior possession, the defendant cannot justify by showing the true title to be outstanding. Id.

An action of trover cannot be maintained for the recovery of a certificate or voucher of a person being entitled to certain shares in a mining association, if the plaintiff can show no legal title to the document. *Dawson* v. *Rishworth*, 1 B. & A. 574. A parol license is sufficient to maintain trover. *Northam* v. *Bowden*, 24 L. J Exch. 237; S. C., 11 Exch. 70; 32 Eng. L. & Eq. 559.

Whether a mining claim may be the subject of larceny or not, see *People* v. *Williams*, 35 Cal. 671.

To enable a party to maintain a right to a mining claim, after the right is acquired, it is necessary that he should continue substantially

to comply with the mining rules and customs which are in force where the claim is situated, and upon which it is made to depend. *Oreamuno* v. *Uncle Sam, etc., Co.* 1 Nev. 215.

§ 12. **Actions in equity.** Courts of equity have been accustomed to give relief, in certain cases, by injunction, to restrain persons from working mines. This remedy was always attainable in actions of waste; and it has been extended to trespasses in mining cases, for the purpose of preventing irreparable mischief. *Gibson* v. *Smith*, Barn. Ch. 497; *Grey* v. *Duke of Northumberland*, 13 Ves. 236; S. C., 17 id. 281; *Clowes* v. *Beck*, 20 L. J. C. C. 505; 13 Beav. 347.

An injunction has been granted to prohibit an owner, who has a limited right to take stone from a quarry in the land of another owner, from abusing his privilege (*Thomas* v. *Oakley*, 18 Ves. 184); to prevent a tenant from removing mineral substances deposited in a pool (*Thomas* v. *Jones*, 2 Y. & C. C. C. 510); to restrain the taking of valuable stones, or nodules of clay, used for making cement and found on the sea beach. *Earl Cowper* v. *Baker*, 17 Ves. 128.

The person in possession will always be entitled to an injunction against an adverse claimant when his acts are injurious to the inheritance. *Lowndes* v. *Bettle*, 33 L. J. Ch. 451; S. C., 13 Am. Law Reg. (N. S., Vol. IV) 169; *Hess* v. *Winder*, 34 Cal. 270; *Munson* v. *Tyson*, 6 Phila. 395.

A bill for an injunction is generally sustained in connection with an account. But, in mining cases, an account may be decreed, though the injunction be refused. *Parrott* v. *Palmer*, 3 Myl. & K. 632.

An injunction will be granted to protect coal mines from injury by water from another coal mine (*Duke of Beaufort* v. *Morris*, 6 Hare, 340. See, too, *Thomas* v. *Jones*, 2 Y. & C. C. C. 510); to protect plaintiffs (first locators) against the refuse coming down from defendant's higher location. *Logan* v. *Driscoll*, 19 Cal. 623. But the granting of the injunction in the last-mentioned case depends upon the character and extent of the injury alleged, whether it be irremediable in its nature, whether an action at law would afford an adequate remedy; whether the parties are able to respond for the damages resulting from the injury, and other considerations which ordinarily govern a court of equity in the exercise of its preventive process of injunction. *Atchison* v. *Peterson*, 20 Wall. 508. By the act of congress of July 26, 1866, which provides "that, whenever by priority of possession, right to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and decisions of courts, the possessors and owners of such vested rights shall be maintained and

protected in the same," the customary law with respect to the use of water, which had grown up among occupants of the public land under the peculiar necessities of their condition, is recognized as valid. *Basey* v. *Gallagher*, 20 Wall. 670.

An injunction to restrain defendants from using the water of a stream for mining purposes will not be granted where the evidence shows only that the head of the plaintiff's ditch was fifteen miles below the defendant's mining ground; that the plaintiffs, who were the first appropriators of the water, were compelled, on account of the working of the ground, to construct and maintain a sand reservoir, and use the water ten minutes daily to clean it, and employ, during that time, one man who was also employed on the ditch for other purposes. *Atchison* v. *Peterson*, 1 Mon. T. 561.

An injunction will be granted to restrain the prosecution of ejectment for the recovery of land which has been occupied for a coal breaker and expenditures made with the acquiescence and assent of the owner. *Big Mountain Imp. Co.'s Appeal*, 54 Penn. St. 361. Where a local custom gives the owner of one mining claim a right to construct a tunnel through an adjoining one, in order to enable him to work his own, a court of equity may enjoin any interference with that right. *Bliss* v. *Kingdom*, 46 Cal. 651. An injunction will be granted to prevent the continuance of a trespass in extracting mineral from a mine; especially when the trespasser is insolvent. *Lockwood* v. *Lunsford*, 56 Mo. 68.

An injunction will not be granted to restrain a lessee from working a coal pit irregularly and detrimentally to the lessor (*Clavering* v. *Clavering*, 2 P. W. 388); nor will it be granted when there is reasonable doubt concerning the direction or identity of faults or dykes which are referred to as boundaries. *Davis* v. *Shepherd*, 35 L. J. Ch. 581; S. C., L. R., 1 Ch. App. 410.

And a mine owner cannot be restrained from blasting in the nighttime, as is usual in mines, because it disturbs the sleep and thus affects the health of the owner of the surface and of his family, or diminishes the value of his estate. *Marvin* v. *Brewster Iron Mining Co.*, 55 N. Y. (10 Sick.) 538; S. C., 14 Am. Rep. 322.

When mines are in danger of being ruined before the establishment of any rights relating to them, the court will entertain a bill of *quia timet*, for quieting the owners in the enjoyment of their rights, and will establish them by decree. *Lord Falmouth* v. *Innys*, Mosely, 87; *Sayer* v. *Pierce*, 1 Ves. 232.

Mining may be regarded as a species of trade, and a bill in equity may be brought for an account of the profits. *Bishop of Winchester*

v. *Knight*, 1 P. W. 406; *Jesus College* v. *Bloome*, 3 Atk. 262; *Norway* v. *Rowe*, 19 Ves. 144. Where mines are in the possession of assignees, or one of many persons entitled to share in the profits, all the reasonable expenses incurred in the management of the concern will be allowed in taking the account. *Scott* v. *Nesbitt*, 14 Ves. 445. A bill for an account may be brought by the owners or lessees of mines against their agents; and if there are mutual accounts, the court will restrain all proceedings at law, and direct the whole accounts to be taken in equity. *Crease* v. *Penprase*, 1 Jur. 840, Exch. A bill for an account may be brought by the mortgagor of mines against the mortgagee in respect of the proceeds arising during the period of his possession. *Hughes* v. *Williams*, 12 Ves. 493.

A bill in equity may be brought for determining questions of disputed boundaries in mining fields. *Sayer* v. *Pierce*, 1 Ves. Sr. 232. The interests of miners in mining claims and ditch property upon the public lands may be partitioned between the owners under the statute. *Hughes* v. *Devlin*, 23 Cal. 501.

In a mining case, a court of equity will (when proper) compel an inspection and survey of the works of the parties. *Thornburg* v. *Savage Mining Co.*, 1 Pac. Mag. 267.

Where the vendor of a certain mine went east to sell shares therein and making misrepresentations of the quality and prospects of the mine, procured certain capitalists, the purchaser among others, to appoint a committee to go and investigate, and the committee reported that the representations were true, and the vendor made extravagant declarations of the rich prospects, but made no warranty or guaranty, it was held that such declarations and representations could only be regarded as the expression of an opinion about a matter of which the committee could judge for themselves, and that they formed no ground for setting aside the contract. *Tuck* v. *Downing*, 76 Ill. 71.

To prove the existence, quantity and quality of coal in certain lands, evidence is admissible that seams of coal have been opened and mined on other lands in the immediate vicinity and similarly situated, in connection with the opinion of witnesses skilled in the geological formation of the neighborhood, that like seams exist on the land in question. *Stambaugh* v. *Smith*, 23 Ohio St. 584.

To control the rule of common law requiring the owner of coal to leave sufficient support to sustain the surface a usage must be so ancient and uniform as to amount to a custom. *Jones* v. *Wagner*, 66 Penn. St. 429; 5 Am. Rep. 385.

The appropriate remedy for a breach of a contract, to convey an interest in a mining claim, is an action for specific performance. *Felger* v. *Coward*, 35 Cal. 650.

CHAPTER XCVI.

MONEY LENT.

ARTICLE I.

OF MONEY LENT.

Section 1. When the action lies. Whenever money is borrowed by one person from another, and there is no taint of illegality in the transaction, the law implies a promise to repay it, and if no time is agreed upon, it is due *instanter* and without demand. In order to maintain this action, it is not necessary that there should be any writing to evidence either the loan, or a promise to repay it. It is enough if a loan in fact is established, or it is shown that money was paid for the defendant, at his request, or under such circumstances that the law will imply a request, and a consequent promise to repay it (*Parker* v. *Newland*, 1 Hill, 87; *Whitman* v. *Lake*, 32 Wis. 189); but it must be a loan to the defendant, and if it is a loan to a third person which the defendant agrees to repay, the action cannot be maintained. *Marriot* v. *Lister*, 2 Wils. 141. Thus, where the agreement declared upon was, that if A would lend B's son a sum of money not exceeding £5, B would pay the same to A, it was held that the amount could not be recovered upon a count for money lent, because B's son was the borrower, and B's promise was only collateral, "for," say the court, "the same money cannot be lent to two." But the court intimated, and such is still the rule, that if the money had been lent to B, although in fact, at his request, given to B's son, the action would have lain. *Butcher* v. *Andrews*, 1 Salk. 23; S. C., 3 id. 15; *Douglass* v. *Reynolds*, 7 Pet. (U. S.), 113. The distinction is that the word *lent* has a technical and certain signification, and can only be applied to the actual borrower. *Butcher* v. *Andrews*, 1 Salk. 23. But it is not essential that the money should have been given to the borrower, or that he should have derived any actual benefit therefrom; it is sufficient if the loan was in fact made to him and upon his sole credit and promise, although for the use and benefit of a third person; as, if B, at the request of C and upon C's promise to repay it, lets D have a

certain sum of money, C is the borrower, although D receives the money from B because the money is loaned to him and upon his sole credit. But if C had requested B to loan money to D, and had agreed to repay it if D did not, an action for money lent would not have lain against C, because he was not the borrower, and his promise was only collateral. *Douglass* v. *Reynolds*, 7 Pet. (U. S.) 113; *Hamilton* v. *Starkweather*, 28 Conn. 138. It is not essential that money in fact should have been loaned, it is sufficient if the borrower received that which was equivalent to money, and upon which money or its equivalent was actually received, as a check, bill of exchange, note, draft, loan certificate or other representative of money. *Mansker* v. *Missouri*, 1 Mo. 452.

When a person is permitted by another to take a certain sum of money from money in his hands belonging to such person, with the understanding that it is to be deducted from money thereafter to become due from such person to him for particular articles to be furnished or services to be rendered, if such articles are not furnished or services rendered, an action as for money lent lies to recover the same. *Shepherd* v. *Philips*, 2 C. & K. 722. A count for money lent will be sustained for money lent to the wife at the husband's request. *Stevenson* v. *Hardie*, 2 W. Black. 872. So, it lies upon an account stated (*Payne* v. *Jenkins*, 4 C. & P. 324); upon an I. O. U. (*Childers* v. *Boulnois*, 1 D. & R. 8; *Douglas* v. *Holme*, 12 Ad. & El. 641); whether it is addressed to any particular person or not (*Curtis* v. *Rickards*, 1 M. & G. 46); but the mere fact that the words "for value received" occur in an instrument as in a bill of exchange or promissory note, do not, of themselves, import a money consideration so as to uphold a count for money lent. It must appear that such was in fact the consideration (*Morgan* v. *Jones*, 1 C. & J. 162); nor is a right of recovery made out by simply showing that the plaintiff handed the defendant a certain sum of money. It must be shown that it was in fact a loan. *Welch* v. *Seaborn*, 1 Stark. 474; *Morse* v. *Bogert*, 4 Denio, 108; 1 Comst. 377. The fact that a loan is received by the deposit of collaterals and that the lender agrees to give notice of a certain time before attempting to compel re-payment, does not deprive the lender of his remedy as for money lent, nor is it incumbent upon him to aver or prove an offer to return the securities. *Scott* v. *Parker*, 1 Ad. & El. (N. S.) 807. Money advanced to one person by another, upon the agreement and expectation that such person will perform some act for the person advancing it in payment thereof, may be recovered under a count for money lent if such person fails to perform his agreement (*Bristowe* v. *Needham*, 9 M. & W. 729); and gener-

ally, it may be said that an action as for money lent will lie when money is loaned to another or is given to a third person at his request, he being the borrower, or, when it is paid to him upon the expectation and agreement that it shall be paid in a particular way, and the person fails to perform his agreement. *Bristowe* v. *Needham*, 9 M. & W. 729; *Stevenson* v. *Hardie*, 2 W. Bl. 872. When a note given for money turns out to be void, the amount may still be recovered under a count for money lent (*Moore* v. *Bank of The Metropolis*, 13 Pet. [U. S.] 302); and it seems that a claim for money lent may be recovered under a general count "for sundry matters chargeable in account" (*Lovejoy* v. *Wilson*, 1 Cr. [C. C.] 102); and a count for money had and received is sustained by a claim for money lent, the rule being that a count for money had and received will always lie whenever money has been received by the defendant which *et æquo et bono* belongs to the plaintiff. *Tutt* v. *Ide*, 3 Blatchf. (C. C.) 249; *Wells* v. *Neville*, 4 Wash. (C. C.) 209; *Page's Adm'rs* v. *Bank of Alexandria*, 7 Wheat. (U. S.) 35. Thus, when money is *advanced* upon forged or counterfeit notes or bills, it has been held that the amount might be recovered under a count for money lent (*Bank of England* v. *Tomkins*, 6 Jur. 348); but if the notes or bills had been purchased, instead of being taken as collateral, the count would not lie, as, in order to sustain it, there must be a promise, express or implied, to repay the money. *In other words, there must be a loan.*

When money is lent by one person to another, the mere fact that the note of a third person is given as collateral does not bar an action for money lent. If the note is not paid within the time within which the loan was to be paid, the lender may sue the borrower for money lent. *Marston* v. *Boynton*, 6 Metc. (Mass.) 127. The count has been upheld by a memorandum of any kind that *prima facie* shows a loan and a promise to repay it as "due A. eighty dollars on demand. B." (*Hay* v. *Hide*, 1 Chip. [Vt.] 214); or "sent R. $56. I say received by me. P." *Peniston* v. *Wall*, 3 J. J. Marsh. (Ky.)37. But an instrument that merely acknowledges the receipt of money, as "received of A. $110," without other evidence, will not sustain the count. *McFarland* v. *Shipp*, 17 Ark. 41.

When a person has, through mistake, delivered up a note upon which there is still a balance due, he may recover it in an action for money lent. *Baxter* v. *Paine*, 16 Gray, 273. Where money is loaned, the fact that it subsequently depreciates in value, will not prevent a recovery for its actual value at the time when the loan was made, so held in a case where the loan was of Confederate money. *Wooten* v. *Sherrard*, 71 N. C. 374. So, although the contract between the parties as to the

time of the repayment of money loaned is void under the statute of frauds, yet, the law will imply a promise to repay the money on demand, and it may be recovered under a count for money lent. *Swift* v. *Swift*, 46 Cal. 266. See, also, *Vanatta* v. *State Bank*, 9 Ohio St. 27. A check given by the borrower for money loaned, which by agreement was not to be presented for payment, is sufficient to sustain an action for money lent, and the measure of recovery is the amount of the check and interest. *Currier* v. *Davis*, 111 Mass. 480.

Where money has been borrowed by an executor without authority, and the estate has received the benefit thereof, the creditor may recover the amount loaned with interest thereon at the legal rate. *Deery* v. *Hamilton*, 41 Iowa, 16.

Money deposited by a customer in a banker's hands is money lent with the superadded obligation, that it is to be repaid when called for. *Pott* v. *Clegg*, 16 M. & W. 321.

§ 2. **When an action for money lent will not lie.** In order to maintain an action for money lent, it must be shown that money or its equivalent representative passed from the plaintiff to the defendant, under a promise, express or implied, to repay the same. *Payne* v. *Jenkins*, 4 C. & P. 324.

The action never lies upon a collateral promise (*Douglass* v. *Reynolds*, 7 Pet. [U. S.] 113); nor where there is not a promise, express or implied, to repay the money. There must be a loan, and the mere fact that the plaintiff has paid money for the defendant, or that the defendant has received and retained money belonging to the plaintiff, will not sustain the action. In such cases, an action for money paid or money had and received is the proper remedy. *Smith* v. *Crocker*, 2 Root, (Conn.), 84; *Beach* v. *Vandenburgh*, 10 Johns. 361; *Charlestown* v. *Hubbard*, 9 N. H. 195; *Bancroft* v. *Abbott*, 3 Allen, 524.

A husband is not liable for money lent to his wife, though the money is afterward applied by her in procuring necessaries, for the supply of which he would have been liable. *Knox* v. *Bushell*, 3 C. B. (N. S.) 334.

§ 3. **Defenses to the action.** This action is open to all defenses that legally bar the plaintiff's right of recovery, as usury (*Grant* v. *Merrill*, 36 Wis. 390; *Tyng* v. *Commercial Warehouse Company*, 58 N. Y. [13 Sick.] 308); payment, or that no loan was in fact made (*Johnson* v. *Jennings*, 10 Gratt. [Va.] 1; *Richardson* v. *Williams*, 49 Me. 558; *Winsor* v. *Savage*, 9 Metc. [Mass.] 346); or that the money was loaned for an illegal purpose (*Kingsbury* v. *Flemming*, 66 N. C. 524; *McKinnell* v. *Robinson*, 3 M. & W. 434); or indeed any matter that in law defeats a right of recovery. The defendant cannot defend

upon the ground that the plaintiff received the money from an illegal enterprise (*Wintermute* v. *Stinson*, 16 Minn. 468); or that he knew it was borrowed for an illegal enterprise, unless it is also shown that he designed that it should be so used (*Bond* v. *Perkins*, 4 Heisk. [Tenn.] 364); or that the money was loaned out of trust funds in the plaintiff's hands (*Patchin* v. *Peck*, 38 N. Y. [11 Tiff.] 39); nor, that the instrument given to evidence the loan was not executed according to the formalities provided by law (*Boisgerard* v. *New York Banking Co.*, 2 Sandf. Ch. 23); nor that the loan consisted of the plaintiff's notes, which were discounted, and were not due at the time when the action was brought (*Hinsdale* v. *Eells*, 3 Conn. 377); nor by any matters that do not defeat the right of recovery. *Prewitt* v. *Martin*, 59 Mo. 325; *Moynahan* v. *Connor*, 30 Mich. 136; *Stolp* v. *Blair*, 68 Ill. 541; *Harington* v. *Macmorris*, 5 Taunt. 228.

The omission of the officer of a national bank to exact security for moneys lent cannot be made a ground of defense to an action brought by the bank to recover such loan. *Union Mining Co.* v. *Rocky Mt. Nat. Bank*, 2 Col. T. 248.

CHAPTER XCVII.

MONEY PAID.

TITLE I.

ARTICLE I.

OF MONEY PAID IN GENERAL.

Section 1. Definition and nature of the action. An action of assumpsit for money paid by one person for another can only be maintained when it was paid in pursuance of a request from such person, express or implied, so that either an express or an implied promise to repay the same can be predicated thereon. *Woodford* v. *Leavenworth*, 14 Ind. 311; *Jones* v. *Wilson*, 3 Johns. 434; *Sharpe* v. *Cummings*, 2 D. & L. 504; *Bancroft* v. *Abbott*, 3 Allen (Mass.), 524; *Taylor* v. *Baldwin*, 10 Barb. 626. It is maintainable in all cases where one party has paid money for another, either at such person's request, or where he had, with such person's assent, express or implied, become liable to pay the same (*Alexander* v. *Vane*, 1 M. & W. 511; *Brittain* v. *Lloyd*, 14 id. 762; *Pursel* v. *Ellis*, 5 W. & S. [Penn.] 525; *Neilson* v. *Gilliam*, 7 Yerg. [Tenn.] 474; *Boylston* v. *Chase*, 2 Col. T. 612); unless the person for whom the money is paid is liable therefor upon some special contract or agreement, in which case the party must resort to his remedy thereon. *Francisco* v. *Wright*, 7 Ill. 691; *Lubbock* v. *Tribe*, 3 M. & W. 607; *Carney* v. *O'Neil*, 27 Mich. 497.

Money voluntarily paid for another, without his request, express or implied, cannot be recovered, as it is well settled that one person cannot make another his debtor without his assent or request. *Ingraham* v. *Gilbert*, 20 Barb. 151; *Turner* v. *Egerton*, 1 G. & J. (Md.) 433; *Lewis* v. *Lewis*, 3 Strobh. (S. C.) 530; *Winsor* v. *Savage*, 9 Metc. (Mass.) 346; *Smith* v. *Poor*, 37 Me. 462; *Oden* v. *Elliott*, 10 B. Monr. (Ky.) 313; *Hall* v. *Smith*, 5 How. (U. S.) 96; *Montgomery* v. *Gibbs*, 40 Iowa, 652; *Richardson* v. *Williams*, 49 Me. 558; *Rensselaer Glass Factory* v. *Reid*, 5 Cow. (N. Y.) 603. By this, it is not to be understood that an express assent or request must exist, but that, in the absence thereof, it must be shown that the person

paying the money, with the assent of the person for whose benefit it was paid, either express or implied, stood in such a relation to the claim that he was legally liable to pay it. *Nichols* v. *Bucknam*, 117 Mass. 488; *Hall* v. *Smith*, 5 How. (U. S.) 96; *Ramsay* v. *Gardner*, 11 Johns. 439; *Hunt* v. *Amidon*, 4 Hill, 345.

Under the common law practice a recovery for money paid was had under a common count in assumpsit "for money paid, laid out and expended for the use of the defendant, at his request," and it was not necessary to set forth either the sum paid, the person to whom, nor the time it was paid, or the circumstances under, or the purposes for which it was paid, but the court would generally, upon motion, direct the filing of specifications by the plaintiff, and when filed, his cause of action was confined to the special matters set forth therein.

In those States where codes have been adopted, or the practice otherwise changed or simplified, more particularity in setting forth the ground of action would probably be necessary to avoid a motion by the defendant to make the complaint more definite and certain. But in all cases whether the action is in general assumpsit or upon a special contract, a request must not only be alleged but proved, or the action is not maintainable. *Taylor* v. *Cotten*, 6 Ired. (N. C.) 69; *Wharton* v. *Franks*, 9 Port. (Ala.) 232.

ARTICLE II.

WHEN THE ACTION LIES.

Section 1. In general. Assumpsit for money paid to the use of another is the proper remedy to determine whether money expended by the plaintiff was for his own use, or that of the defendant (*Williams* v. *Sheppard*, 13 N. J. Law, 76); and is maintainable, although the statute gives another remedy, unless the statute abolishes the remedy in terms, or by necessary implication. *Betts* v. *Hilliard*, 2 Root (Conn.), 131.

In order to maintain the action, as has been previously stated, the money must have been paid in pursuance of the request of the defendant, express or implied, and not officiously, and as a mere voluntary favor (*Bailey* v. *Bussing*, 28 Conn. 455; *Burdick* v. *Glass Co.*, 11 Vt. 19; *Jones* v. *Wilson*, 3 Johns. 434; *Dawson* v. *Dawson*, 12 Iowa, 512), and money must have been actually paid. It is not enough that the plaintiff has become liable to pay it, as that he assumed the debt and has been accepted as sole debtor (*Dedman* v. *Williams*, 2 Ill. 154); or that he was surety for the defendant and has been sued upon his contract, and a judgment obtained against him for the amount. *Pursel* v. *Ellis*, 5 W. & S. (Penn.) 525; *Morrison* v. *Berkey*, 7 S. & R.

(Penn.) 238; *Hodges* v. *Armstrong*, 3 Dev. (N. C.) 253; *Gardner* v. *Cleveland*, 9 Pick. 337.

But a bill of exchange, or a negotiable note given and received in satisfaction of the debt, will support a count for money paid, and doubtless a complete satisfaction of the debt so far as the defendant is concerned would be sufficient in whatever manner it may have been effected, provided that no greater sum could be recovered than the plaintiff had paid, or become obligated to pay. *Ingalls* v. *Dennett*, 6 Me. 80; *Douglas* v. *Moody*, 9 Mass. 553; *Cumming* v. *Hackley*, 8 Johns. 202; *Lapham* v *Barnes*, 2 Vt. 213; *Planters' Bank* v. *Douglass*, 2 Head (Tenn.), 699. When two or more persons are jointly liable upon the same debt, as a note, bill of exchange or other debt or obligation, and one pays the entire debt, he may sue his co-debtor for his share of the debt as for money paid to his use. *McGregory* v. *McGregory*, 107 Mass. 543; *Sexton* v. *Sexton*, 35 Ind. 88; *Allyn* v. *Boorman*, 30 Wis. 684. Thus, where one mill owner pays the entire expense of repairs upon a mill-dam that supplies the mill with power, he may sue his co-owner for one-half the amount as for money paid for his use. *Mullett* v. *Bemis*, 100 Mass. 92.

And it has been held that in order to maintain an action for money paid, it is not necessary that the defendant should be relieved by the payment from a liability to a third person. *Lewis* v. *Campbell*, 8 C. B. 541. And see *Emery* v. *Hobson*, 62 Me. 578; S. C., 16 Am. Rep. 513.

But one who has paid money for the benefit of another cannot maintain an action against such person, unless there is a legal liability on his part to refund the whole or a part of it. The fact that he is equitably bound to refund is not enough, an absolute legal liability must be established. Thus, where a person, vested with the legal title to real estate, paid the taxes thereon, it was held that he was not entitled to recover the same of the owner of the equitable title who was in possession. It was held to be a voluntary payment without any request from the equitable owner, express or implied. *Bryant* v. *Clark*, 45 Vt. 483. But where a legal liability is established, an action for money paid will lie, even though the defendant is liable to the plaintiff for the same money upon the covenants in a deed or other instrument under seal. *Boylston* v. *Chase*, 2 Col. T. 612. See, also, *Betts* v. *Hilliard*, 2 Root (Conn.), 131, to same effect. But a different rule has been established in Michigan, though the doctrine before stated seems to be predicated upon more substantial justice, and to be in better accord with principle. *Carney* v. *O'Neil*, 27 Mich. 495. Where a person pays a debt which another is bound to pay, in order

to save his property from sale upon legal process, as where a tenant has contracted to pay the taxes which are assessed upon lands against his landlord, or to pay a certain debt existing against the payor, he may maintain an action against the person legally bound to pay the same. *Nichols* v. *Bucknam*, 117 Mass. 488; *Soulard* v. *Peck*, 49 Mo. 477. So, the action lies in favor of the buyer of property, for money which he is compelled to pay to remove any incumbrance upon the property existing before he purchased it. *Sargent* v. *Currier*, 49 N. H. 310; 6Am. Rep. 524.

It seems that a person who pays the note of a corporation upon the request of its president, may maintain an action against the corporation for money paid to its use. *Atkins* v. *Brown*, 59 Me. 90. If money is paid at the request of another, it may be recovered in this form of action, although it was paid to quiet an illegal demand (*Mills* v. *Johnston*, 23 Tex. 308); and it makes no difference whether he pays in goods or money, if it is accepted by the creditor in lieu of money. *Cook* v. *Linn*, 19 N. J. Law, 11.

As illustrative of those instances in which the law implies a request, an indorser who pays a note or bill of exchange may recover the amount of the maker (*Christine* v. *Chaney*, 5 La. Ann. 219; *Garnsey* v. *Allen*, 27 Me. 366); so, where a person, not a party to a note or bill, pays it for the *honor* of the maker, he has been held entitled to recover the amount of him (*Leake* v. *Burgess*, 13 La. Ann. 156); so, where one of two co-purchasers pays for the whole of the goods, he may recover of the other the proportion he was to pay (*Dedman* v. *Williams*, 2 Ill. 154); so, where money has been expended by one in carrying on another person's business, unless he occupies the position of a mere meddler, he may recover of the owner of the business the amount expended by him, although another person holds his power of attorney (*Didier* v. *Auge*, 15 La. Ann. 398); so, it has been held that where a debtor has been committed to jail upon a *capias*, and while there has been supported at the expense of the creditor, the law implies a promise on his part to repay the amount (*Briggs* v. *Lewiston*, 29 Me. 472); and, generally, it may be said that where one person pays money for the benefit of another, *with his consent*, express or implied, where the payment was not, at the time, understood to be gratuitous, the law implies a promise to repay it. *Packard* v. *Lienow*, 12 Mass. 11. But if the payment is made by several persons, it cannot be recovered in a joint action, unless the consideration is joint, so that a joint promise can be implied, but each must sue for the proportion paid by him. *Liddell* v. *Brant*, 17 Mo. 150.

§ 3. **Of the request.** In order to entitle a person to recover for money paid for another, a request, express or implied, must be established, or an express promise to repay it, and it may be said that, in all cases where there is a legal obligation on the part of the person paying to pay the money, the primary obligation resting upon the person for whose benefit it was paid, the law implies a request and a consequent promise that will uphold an action to recover it back. *Bailey* v. *Bussing*, 28 Conn. 455; *Keith* v. *Easton*, 21 Pick. 261; *Hunt* v. *Amidon*, 4 Hill, 345; *Pearce* v. *Wilkins*, 2 N. Y. (2 Comst.) 469. Thus, where one pays money to satisfy a debt of a person, at his request, from such request the law would imply a promise to repay it. *Cook* v. *Linn*, 19 N. J. Law, 11; *Mills* v. *Johnston*, 23 Tex. 308.

And this would be the case where there is no express request, but a tacit assent to such payment, as where A pays money for B when B is present, to which he does not object, unless the circumstances are such as to indicate that it was gratuitous, the law from such tacit assent will treat the money as having been paid at B's request. *Packard* v. *Lienow*, 12 Mass. 11.

The rule may be stated to be that, in all instances, in order to maintain an action for money paid for the use of another, it must appear that it was paid at his request, express or implied, or that, after such payment, there was an express promise to pay it back. If there is a request, express or implied, from that the law implies the requisite promise, and if there was a subsequent express promise to repay it, from that the law implies the requisite previous request. *Bailey* v. *Bussing*, 28 Conn. 455; *Leake* v. *Burgess*, 13 La. Ann. 156; *Hall* v. *Smith*, 5 How. (U. S.) 96; *Ticonic Bank* v. *Smiley*, 27 Me. 225; *Powell* v. *Lawhead*, 13 La. Ann. 627; *Ramsey* v. *Gardner*, 11 Johns. 439.

Thus, in *Rodman* v. *Denison*, 21 Conn. 406, the plaintiff brought an action against the indorser of a promissory note, upon the common counts for money paid to his use, etc., but failed to prove any demand upon the maker, in consequence of which he could not recover upon the special counts, but the plaintiff proved that, after the defendant indorsed the note, he had himself indorsed it, at the defendant's request, and for his sole accommodation, under a promise of indemnity. Upon these facts, the court held that the plaintiff could recover under the count for money paid. So, in *Ramsey* v. *Gardner*, 11 Johns. 439, where A applied to B for his advice how to draw a large sum from Scotland, and, following B's advice, drew a bill of exchange in his favor, which B negotiated, but, the bill being protested, he was compelled to pay damages and expenses. In an action for money paid, it

was held that the damages and expenses were recoverable from A, as B, acting merely as the agent of A, and in good faith, for the benefit of A, and not for his own benefit, must be regarded as having paid the money at A's request. So, where a widow, to whom dower had been assigned out of the estate of her deceased husband, was compelled to pay the taxes on the whole estate, in order to save the forfeiture of her estate, it was held that she might recover of the person who owned the remainder, the portion of the tax belonging to the part of the estate owned by him, as for money paid at his request. *Graham* v. *Dunnigan*, 6 Duer (N. Y.), 629. So, where several persons were engaged in running a line of stages, and judgment was obtained against one, who paid it, for injuries sustained by a passenger through the negligence of a driver, it was held that he could maintain an action against the others as for money paid, for the proportion they ought to pay (*Horbach* v. *Elder*, 18 Penn. St. 33; *Bailey* v. *Bussing*, 28 Conn. 455), the law implying a request and a promise on their part, from their primary liability; and so, in all cases where a person paying money is under a legal obligation to pay it, by reason of his relation to the claim, the law treats him as having paid it at the request of the person or persons upon whom the primary liability rests, and the same is true where several are primarily liable, if one of them pays the *whole* claim, he may maintain an action for money paid against the others to recover their proportion thereof. *McClure* v. *Wilson*, 43 Ill. 356; *Long* v. *Greene*, 7 Mass. 268; *Blunt* v. *Mott*, 10 Abb. Pr. (N. Y.) 222; *Norton* v. *Coons*, 3 Denio, 130; *Gleason* v. *Dyke*, 22 Pick. 390. But, where money is paid voluntarily, even though the person for whom it was paid was legally liable to pay it, or although it was paid to save him from trouble and expense, there being no request, express or implied, it cannot be recovered in this form of action. Thus, where a tax collector voluntarily paid a person's tax (*Beach* v. *Vanderburgh*, 10 Johns. 361; *Smith* v. *Crocker*, 2 Root [Conn.], 84); or an officer having an execution voluntarily paid the amount (*Little* v. *Gibbs*, 4 N. J. Law, 213; *Menderback* v. *Hopkins*, 8 Johns. 436); there being no request, express or implied, an action for money paid will not lie.

And if money has been paid, and an express request is relied upon, it must be shown to have been made by the debtor himself or his agent duly authorized to make it. *Burdick* v. *Glass Co.*, 11 Vt. 19. So, where a person voluntarily, and without any request, express or implied, assumes a liability for another, he cannot recover of such person money that he has been compelled to pay thereon as, where a person voluntarily, and without any request from the maker becomes

a surety for him upon a note, bond or other security, although he is compelled to pay the claim, he cannot recover the amount in an action for money paid. In order to recover for money paid under a claim paid as surety, it must be shown that the person paying it became surety at the request of the person of whom recovery is claimed. *McPherson* v. *Meek*, 30 Mo. 345. A person cannot by officiously and gratuitously assuming to do so alter the legal state or position of another in reference to a claim. It is the right of every person to say what relation he will hold to a claim, and whether he will pay it or not, and if another person, in disregard of this right, voluntarily assumes to change his relation thereto, he does so at his own cost, and cannot charge such other with liability to him for any of the fruits of his officiousness. *Ege* v. *Koonz*, 3 Penn. St. 109. Thus, where a town voluntarily paid the entire fees of commissioners appointed by the legislature for establishing the boundary line between it and another town, under a resolution of the legislature that the expense should be paid by them, each paying one-half, it was held that the amount so paid could not be recovered of the other town, as it was paid voluntarily and without any request from it, express or implied. *South Scituate* v. *Hanover*, 9 Gray, 420. See, also, to the same effect, *Bancroft* v. *Abbott*, 3 Allen, 524; *Chrisman* v. *Long*, 1 Ind. 212; *Burdick* v. *Glass Co.*, 11 Vt. 19. When a person has become surety for another or has agreed to pay certain specific sums for him, the request only applies to the particular sum in question, and if he pays sums in excess thereof, as to such excess, the payment is voluntarily and not recoverable. *Montgomery* v. *Gibbs*, 40 Iowa, 652. So, where a person is employed to work for another, he cannot charge his employer except for his own services. If he employs another person to assist him, he cannot charge his employer with the money paid to such person therefor. *Junkins* v. *Union School District*, 39 Me. 220. In all cases the money must be alleged to have been paid at the defendant's request, and facts must be shown that establish it, or no recovery can be had. *Taylor* v. *Cotton*, 6 Ired. (N. C. L. 69; *Wharton* v. *Franks*, 9 Port. (Ala.) 232.

There are instances where the obligation imposed upon a person to do an act, and the necessity for its being done at once, are such that any person may, upon such person's neglect or refusal to do it without any request or promise from the person upon whom the obligation rests, procure it to be done, and recover the amount paid by him therefor in an action for money paid, the law implying a request to any person to do it. Thus, the husband is bound upon the decease of his wife to provide her with a funeral at a reasonable expense, and if he does not

do so, it has been held that any person who voluntarily employs an undertaker, and pays him for performing such a funeral, is entitled to recover the sum so expended, from the husband in an action for money paid. *Ambrose* v. *Kerrison*, 10 C. B. 776. *Ante*, Vol. 2, 128. So, it seems that where money is paid by one for another, in pursuance of the usages of a business, the law will imply a request. Thus, if a party authorizes a broker to buy shares for him in a particular market where the usage is, that when a purchaser does not pay for his shares within a given time, the vendor, giving the purchaser notice, may re-sell and charge him with the difference; and if a broker acting under the authority buys at such market in his own name, he may, if he is compelled to pay a difference on the shares through a neglect of his principal to supply funds, sue the principal for money paid to his use. *Pollock* v. *Stables*, 12 Ad. & El. (Q. B.) 765; *Bayliffe* v. *Butterworth*, 1 Exch. 425. *Ante*, Vol. 1, 229. So, where a person employed a broker who was a member of the stock exchange to purchase certain stocks, and at the time of purchase a call had been made, but was not then payable, and the seller paid the call in order to enable her to make a transfer of the shares to the broker, who by the rules of the stock exchange was personally responsible for it, and paid the amount to the seller, it was held that he was entitled to recover the amount of such call so paid by him, of the purchaser, as for money paid to his use. *Bayley* v. *Wilkins*, 7 C. B. 886; *McEwen* v. *Woods*, 11 Q. B. 13. *Ante*, Vol. 1, 229.

A person who deals with another in reference to a business in reference to which certain usages or fixed regulations exist, is presumed to deal in reference to such usages and regulations. Thus, where the defendant employed a broker to purchase certain railway shares for him, which the broker did, and subsequently at his request the broker sold the shares, and paid over to the defendant the amount received therefor less his commissions, and after the sale it was ascertained that the certificates were forgeries, and a resolution was passed by the stock exchange that the holders of shares in such railway company found to be spurious should have a right to demand of the sellers thereof genuine shares in exchange, or to have ten shillings premium per share until genuine shares were delivered, in consequence of which the broker was compelled to comply with the rule, it was held that he was entitled to recover the amount paid by him in pursuance of such resolution of the stock exchange, the law implying a promise on the part of the defendant, which would uphold an action for money paid for the amount of the purchase-money, but no more, as the right of a purchaser on such sale was at the moment of the sale to have back his purchase-money, but not to ask for genuine certificates, and, therefore,

that no more than such purchase-money was *necessarily* paid by the plaintiff. *Westropp* v. *Soloman*, 8 C. B. 345; 13 Jur. (C. P.) 1104.

Where several persons combine to defend an action, and one of them pays the expenses, he may recover of the others their proportionate share thereof, the law implying the requisite request. *Edgar* v. *Knapp*, 5 M. & Gr. 753; 6 Scott, 707

§ 3. **Of the payment.** An action for money paid cannot be maintained by one, unless he has actually paid the money. The mere fact that he is liable to pay it, as, that a judgment has been obtained against him, is not enough. *Pursel* v. *Ellis*, 5 W. & S. (Penn.) 525; *Morrison* v. *Berkey*, 7 S. & R. (Penn.) 238; *Whiting* v. *Aldrich*, 117 Mass. 582; *Hodges* v. *Armstrong*, 3 Dev. (N. C.) 253; *Gardner* v. *Cleveland*, 9 Pick. (Mass.) 337; *Dedman* v. *Williams*, 2 Ill. 154. He must have actually paid the claim, either in money or in property accepted as money, or in some way, so that no liability exists against the defendant therefor, except to him. *Miller* v. *Howry*, 3 Penn. & W. (Penn.) 374, 380. Thus, if a surety takes up the old note, and gives his own in payment, it is held such a payment of the old note as upholds an action for money paid, because the liability of the principal upon the old note is thus discharged (*Neale* v. *Newland*, 4 Ark. 506; *Hall* v. *Whitaker*, 7 Ired. [N. C.] L. 353; *White* v. *Carlton*, 52 Ind. 371; *Pearson* v. *Parker*, 3 N. H. 366; *Cornwall* v. *Gould*, 4 Pick. 447; *Lapham* v. *Barnes*, 2 Vt. 213; *Witherby* v. *Mann*, 11 Johns. 518; *M'Lellan* v. *Crofton*, 6 Me. 333); and, generally, the plaintiff must show that the defendant's liability upon the matter for which he claims to recover of him for money paid has been completely discharged, except as to himself. *Dedman* v. *Williams*, 1 Scam. (Ill.) 154. But see *Lewis* v. *Campbell*, 8 C. B. 541; *Emery* v. *Hobson*, 62 Me. 578; S. C., 16 Am. Rep. 513.

The rule is that a party who contracts a debt, or assumes a liability for another, cannot maintain an action against him for money paid thereon until he has himself paid the debt, or otherwise discharged it; as where a vessel was captured, and one of the parties interested agreed with the captors, in order to obtain a release of the vessel and cargo, to pay a sum of money as a ransom, and thereupon drew a bill of exchange which they accepted and released the vessel, it was held that an action would not lie against the other parties for contribution until he had paid the bill. *Douglas* v. *Moody*, 9 Mass. 548. See, also, to same effect, *Lomax* v. *Pendleton*, 3 Call. (Va.) 538. But when the individual note of one, or even where property has been received as money, and the original claim is quieted, the rule is otherwise. *Ainslie* v. *Wilson*, 7

Cow. 662; *Witherby* v. *Mann*, 11 Johns. 518; *Clark* v. *Foxcroft*, 7 Me. 355.

§ 4. **Of compulsory payment.** Where two or more persons are jointly liable upon a claim, or where they stand in such a relation to it that, unless the other pays his proportion thereof, he will be put to trouble or expense, or his rights will be seriously jeopardized, he may pay the whole and pursue the other for his proportion. *Graham* v. *Dunnigan*, 6 Duer (N. Y.), 629; *Horbach* v. *Elder*, 18 Penn. St. 33; *Bailey* v. *Bussing*, 28 Conn. 455; *Dodge* v. *Wilkinson*, 3 Metc. (Mass.) 292. So, where a person is compelled by operation of law to pay a debt which another in equity and good conscience ought to pay, he may recover the amount of such person. *Ticonic Bank* v. *Smiley*, 27 Me. 225; *Vance* v. *Boyce*, 2 La. Ann. 827. Where a purchaser of real estate promises the seller to pay the taxes assessed upon the estate, if he fails to do so, and the seller is compelled to pay them, he may recover them of the buyer as for money paid to his use, and the same rule would prevail as to the purchaser if he was compelled to pay taxes assessed upon the estate against the vendor, and which the vendor ought to pay. *Brackett* v. *Evans*, 1 Cush. 79; *Graham* v. *Dunnigan*, 6 Duer (N. Y.), 629.

It is not necessary, in order to constitute a payment compulsory, that legal proceedings should have been actually commenced. It is enough if a valid claim exists, that must be paid in order to preserve the rights of the person paying, although the claim is against another. Thus the plaintiff, having purchased an equity of redemption, sold on execution, paid off the mortgage, and the mortgagee, after canceling the mortgage deed and note, and indorsing on the mortgage a discharge thereof, delivered them up to the plaintiff, who, upon payment of the amount for which the equity was sold, released to the mortgagor all the right acquired by him under the sale. It was held that, as the plaintiff was obliged to pay the debt in order to secure his equitable interest in the land, he could recover the amount of the mortgagor as for money paid to his use. *Gleason* v. *Dyke*, 22 Pick. 390.

§ 5. **Of contribution.** Where two or more persons are jointly liable to pay a claim, and one of them pays the whole of it, either voluntarily or by compulsion of legal process, he may recover of the others the proportion of the claim that each ought to pay. *Bailey* v. *Bussing*, 28 Conn. 455; *Horbach* v. *Elder*, 18 Penn. St. 33. Thus, where one of several drawers of a bill of exchange joined in it as principal, and the others as sureties for him, and the drawee, with a knowledge of these facts, accepted and paid it, without any funds of the drawer being in his hands, it was held that there was an implied obligation on the

part of all the drawers, sureties as well as principal, to indemnify him, and that he could recover against them all, as for money paid. *Dickerson* v. *Turner*, 15 Ind. 4. So, where the owners of different mills on the same stream agreed to pay the several sums subscribed by them for the purpose of raising a reservoir for the use of the mills, it was held that they thereby became liable to each other to contribute to the expenses necessarily incident thereto, including damages caused thereby by flowing the lands of others, and that, though one of the owners conveyed his right in the mill and reservoir before a judgment was recovered by a land-owner for damages resulting from flowage, yet, he was liable to the other owners for his proportion of the amount of such damage in proportion to his proprietary interest in the reservoir at the time of his subscription, and not in proportion to the amount of his subscription (*Dodge* v. *Wilkinson*, 3 Metc. [Mass.] 292); and, generally, where one of two or more joint debtors pays the whole debt, his co-debtors are liable to him in an action for money paid, for the proportion which they ought to pay. *Horbach* v. *Elder*, 18 Penn. St. 33; *Owens* v. *Collinson*, 3 G. & J. (Md.) 25; *Snyder* v. *Kirtley*, 35 Mo. 423; *Crawford* v. *Kirksey*, 50 Ala. 590; *Dussol* v. *Bruguiere*, 50 Cal. 456; *Golsen* v. *Brand*, 75 Ill. 148; *Fielding* v. *Waterhouse*, 8 Jones & Sp. (N. Y.) 424; *White* v. *Carlton*, 52 Ind. 371. But where a surety or a joint debtor pays a claim that is barred by the statute of limitations, he can have no contribution from the principal or his co-debtor. *Williamson* v. *Rees*, 15 Ohio, 572; *Williamson* v. *Collins*, 17 id. 354. For further information upon the subject of contribution, see *ante*, Vol. 2, 288–303; also, Vol. 1, p. 182.

§ 6. **Co-contractors.** It is not essential in order to maintain an action for money paid, as for contribution, by one joint contractor against another, that the technical relation of partnership should be established. *Finlay* v. *Stewart*, 56 Penn. St. 183. It is enough if a joint liability is established, and the party seeking contribution has paid more than his share thereof. *Owens* v. *Collinson*, 3 G. & J. (Md.) 25; *Gillilan* v. *Nixon*, 26 Ill. 50. The doctrine of contribution is held to apply with equal force between co-contractors as it does between co-sureties, and if one performs more than his share of the contract, or expends more than his ratable share of the expenses, he is entitled to be re-imbursed by his co-contractor as to all excess. *Chipman* v. *Morrill*, 20 Cal. 130; *Snyder* v. *Kirtly*, 35 Mo. 423; *Finley* v. *Stewart*, 56 Penn. St. 183. But he is restricted in his recovery to a moiety of the excess paid by him. *Snyder* v. *Kirtley*, 35 Mo. 423.

§ 7. **Wrong-doers.** Generally, one wrong-doer who has been compelled to pay the damages done by several who co-operated with him

in the wrongful act, cannot proceed for contribution against those who co-operated with him. *Rhea* v. *White*, 3 Head (Tenn.), 121; *Moore* v. *Appleton*, 26 Ala. 633; *Acheson* v. *Miller*, 18 Ohio, 1; *Peck* v. *Ellis*, 2 Johns. Ch. 131. But there are exceptions to this rule, and, where there was no intentional wrong, or violation of law, the rule does not apply. It is restricted to that class of cases where the wrong was intentional, or must be presumed to have been done with knowledge of its unlawful character (*Acheson* v. *Miller*, 18 Ohio, 1; *Bailey* v. *Bussing*, 28 Conn. 455; *Horbach* v. *Elder*, 18 Penn. St. 33; *Moore* v. *Appleton*, 26 Ala. 633), and the test of the right of contribution, as given above, is to be applied to the nature of the wrong as stated in the complaint or declaration. If that sets forth an act not manifestly illegal, the right of contribution exists, but if it fails to show the nature of the wrong, the rule of no contribution prevails and its real character cannot be shown by evidence *dehors* the record. *Hunt* v. *Lane*, 9 Ind. 248.

§ 8. **Payments without legal proceedings.** It is not essential to the maintenance of an action for money paid, because of a liability that he was under for the person, that he should have paid it under the compulsion of legal proceedings. It is enough that a legal liability existed against the person sought to be charged, and that the money was paid under such circumstances that the law would imply a request and consequent promise to repay it. *Keith* v. *Easton*, 21 Pick. 261; *Graham* v. *Dunnigan*, 6 Duer (N. Y.), 629; *Gleason* v. *Dyke*, 22 Pick. 390. But if the principal debtor notifies the person paying that he has a defense to the claim, or if the matter is one that does not grow out of a contract, a person, although his rights may be seriously affected by an adverse judgment, is bound to await the bringing of an action, when he must cite in the party to be affected thereby, and give him an opportunity to defend the action, and failing to do so, he cannot recover of him the money he is compelled to pay upon such claim, and the same is true when he has reason to apprehend that there is a defense to the claim. *Barmon* v. *Lithauer*, 1 Abb. Ct. App. (N. Y.) 99; 4 Keyes, 317.

In *Pettman* v. *Keble*, 9 C. B. 701; 15 Jur. 38, the plaintiff, as the agent of the defendant, ordered for him goods of a certain description, and for a particular purpose, of a certain firm, the defendant undertaking to save the plaintiff harmless from the consequences. The goods sent were of a different description from those ordered, and were not fit for the purpose required, but the vendors claimed that they had been misled by mis-spelling in the order given by the plaintiff and refused to take them back. An action was brought against the plaintiff for the goods,

and he notified the defendant thereof, and afterward compromised the suit by returning the goods and paying a specific sum of money, in settlement. It was held by the court that the plaintiff must be treated as having authority from the defendant to settle the action, he having failed to take any step to refund the same, and might recover of him the money paid in an action as for money paid to his use. But where there is no request to pay a claim existing against property which has been purchased by another, and he is indemnified against such claim by the vendor, he has no right to pay it, simply because he supposed he would ultimately be obliged to do so. Thus, where the defendant bought a farm of the plaintiff, which was under mortgage for £223, and paid the price, except the amount of the mortgage, and gave a promise in writing, to pay what he owed to the mortgagee, the plaintiff voluntarily, and without suit, paid the debt to the mortgagee, supposing that in the end he should be compelled to do so, and then brought a suit for what he had so paid, it was held that he could not recover. *Postell* v. *Ramsay*, 2 Const. Rep. (S. C.) 429.

§ 9. **Money paid by sheriffs.** If a sheriff or other officer holding an execution or other process against a person voluntarily pays the claim, he cannot recover the amount of the person for whose benefit it is paid (*Little* v. *Gibbs*, 4 N. J. Law, 213; *Menderback* v. *Hopkins*, 8 Johns. 436); and the same rule prevails in reference to a collector of taxes. If he voluntarily pays a tax due from a person, he cannot recover the amount in an action for money paid (*Smith* v. *Crocker*, 2 Root [Conn.], 84; *Beach* v. *Vanderburgh*, 10 Johns. 361); but a contrary doctrine has been held in Maryland, and, perhaps, the rule would be different if, by law, the collector becomes liable for the tax if not paid by a specified time. *Ott* v. *Chapline*, 3 H. & M. (Md.) 323. So, too, both as to the sheriff or tax collector, the rule is different when the money is paid at the request of the debtor or tax payer. *Leonard* v. *Ware*, 4 N. J. Law, 150.

§ 10. **Expenses of bail.** When a person becomes bail for another, he is entitled to recover all expense he has been put to by reason of such relation, such as re-arresting the principal, but not for expenses incurred in improperly defending an action (*Fisher* v. *Fallows*, 5 Esp. 171); nor for trouble and expense in going to a place to become bail. *Reason* v. *Wirdnam*, 1 C. & P. 434; *Hector* v. *Carpenter*, 1 Stark. 190.

§ 11. **Amount of recovery.** The recovery in all cases is limited to such a sum as the person sought to be charged is legally liable to pay which is generally, but not necessarily, the sum actually paid, and interest thereon, but in no case can the recovery exceed the sum which the

plaintiff has paid (*Stone* v. *Darnell*, 25 Tex. Supp. 430); and in ascertaining the amount of recovery, the equities of the case will be considered (*Caulon* v. *Green*, 2 Caines, 154); and costs will not be allowed where the claim ought to have been paid without suit, that is, where there was no possible defense, unless he was authorized to defend the action by the person sought to be charged with such payment. *Gillett* v. *Rippon*, M. & M. 406; *Newman* v. *Goza*, 2 La. Ann. 642.

§ 12. **Payments upon illegal transactions.** When money is paid by one at the special request of another, it may be recovered back, even though it was paid upon an illegal transaction. *Mills* v. *Johnson*, 23 Tex. 308; *Webb* v. *Brooke*, 3 Taunt. 11; *Child* v. *Morley*, 8 T. R. 610; *Simpson* v. *Bloss*, 7 Taunt. 246. Thus, if two persons jointly engage in a stock jobbing transaction and incur losses, and employ a broker to settle the differences, and one of them repays the broker the whole sum *with the privity and consent of the other*, he may recover a moiety of such sum in an action for money paid, although it is contrary to statute. *Petrie* v. *Hannay*, 3 T. R. 418. And the fact that money was paid upon a demand that was usurious, and could not have been enforced, is no defense to an action for money paid by one, who paid it at the defendant's request. One who pays money at the request of another, has a right to recover it back irrespective of the validity of the claim paid, unless the payment of it *was itself* contrary to law. *McElroy* v. *Melear*, 7 Coldw. (Tenn.) 140.

ARTICLE III.

WHEN THE ACTION DOES NOT LIE.

Section 1. In general. The action for money paid will lie in all cases where the money is paid at the express request of a person (*Webb* v. *Brooke*, 3 Taunt. 11; *Simpson* v. *Bloss*, 7 id. 246; *Petrie* v. *Hanney*, 3 Term R. 418; *Reynolds* v. *Doyle*, 1 M. & G. 753); or where the money is paid under such circumstances that the law will imply a request and promise (*Reynolds* v. *Doyle*, 1 M. & G. 753); and in no other instances unless, there having been a previous legal or equitable liability, an express promise subsequent to such payment is established. Thus, where a stranger, without any legal obligation to do so, expended his own funds in maintaining an orphan child, who subsequently became possessed of a large estate out of which no allowance for her education was applied for or made, it was held that this was a sufficient consideration to support an express promise made by her after she became of age, to refund the sums expended for her, and that under such

promise an action for money paid might be maintained for their recovery. *Baker* v. *Gregory*, 28 Ala. 544. In the absence of either of the conditions named, an action will not lie, and the payment is treated as voluntary. *Chrisman* v. *Long*, 1 Ind. 212; *Bryant* v. *Clark*, 45 Vt. 483; *Barmon* v. *Lithauer*, 1 Abb. Ct. App. (N. Y.) 99; *Junkins* v. *Union School Dist.*, 39 Me. 220; *Burdick* v. *Glass Co.*, 11 Vt. 19; *South Scituate* v. *Hanover*, 9 Gray, 420. And this is so, even though the party paying it did so under the mistaken belief that he was legally bound to pay it. *Bancroft* v. *Abbott*, 3 Allen, 524; *Ege* v. *Koontz*, 3 Penn. St. 109. Where money is voluntarily paid, the action will not lie, however beneficial it may be to the defendant. Thus, where one ship-owner, without any authority from his co-owner, and without his knowledge or consent, procured repairs to be made upon the vessel in the home port, it was held that he could not recover any portion of the money expended therein. *Benson* v. *Thompson*, 27 Me. 471. So, it has been held that, where a town voluntarily pays the whole of a certain sum, which belongs to it, and another town, to pay in equal sums, it cannot recover a moiety thereof of such other town. *South Scituate* v. *Hanover*, 9 Gray, 420. See, also, to the same effect, *Bancroft* v. *Abbott*, 3 Allen, 524; *Ege* v. *Koontz*, 3 Penn. St. 109; *Burdick* v. *Glass Co.*, 11 Vt. 19.

So, where a person, without any request to that end, procured a person to perform certain services for a school district, and paid him therefor, it was held that he could not recover back the sum paid therefor, in an action for money paid for the use of the district. *Jenkins* v. *Union School District*, 39 Me. 220. So, where an agent of a transportation company, that had undertaken to convey goods, expended money upon them to render them fit for being forwarded, it was held that he could not recover the amount so paid, it not having been expended at the request or by the direction of the owners. *Carson* v. *Ely*, 23 Mo. 265. So, generally, unless there is an express or implied request to pay the money, it cannot be recovered back, however much benefit the defendant may have derived therefrom. The principle upon which the doctrine is predicated is, that a person cannot make another a debtor against his will, and, if he officiously intermeddles with the affairs of another, and attempts to make him his debtor, without his knowledge or assent, by paying money for him, it is treated as a gratuity. *Ege* v. *Koontz*, 3 Penn. St. 109; *Lewis* v. *Lewis*, 3 Strobh. (S. C.) 530; *Rensselaer Glass Co.* v. *Reid*, 5 Cow. 603; *Stephens* v. *Brodnax*, 5 Ala. 258; *Taylor* v. *Baldwin*, 10 Barb. 626; *Thompson* v. *Chretien*, 3 La. Ann. 116; *Smith* v. *Poor*, 37 Me. 462; *Richardson* v. *Williams*, 49 id. 558; *Woodford* v. *Leavenworth*, 14 Ind. 311;

Oden v. *Elliott*, 10 B. Monr. (Ky.) 313; *Burdick* v. *Glass Co.*, 11 Vt. 19; *Mayor, etc.* v. *Hughes*, 1 G. & J. (Md.) 497; *Dawson* v. *Dawson*, 12 Iowa, 512. And the same rule prevails where one has become liable for another, at his request even, as an indorser, if, by reason of a failure of the holder of the note or bill, to take the proper steps to charge him with liability, whereby he is discharged, and, after he is so discharged, he pays the debt, he cannot recover it of the maker of the note, as the request only raised a promise to pay him back any money that he might legally be compelled to pay as such indorser, and when his legal liability ceased, the promise ceased also, and a subsequent payment of the obligation was merely gratuitous (*Munroe* v. *Easton*, 2 Johns. Cas. [N. Y.] 75); and the same rule has been adopted where the maker has been discharged in insolvency (*Lynch* v. *Reynolds*, 16 Johns. 41); and in no case can a recovery be had in such an action, unless the money has been paid (*Platt* v. *Smith*, 14 Johns. 368; *Pursel* v. *Ellis*, 5 W. & S. [Penn.] 525); or property has been received in lieu of the money (*Ainslie* v. *Wilson*, 7 Cow. 662; *Bonney* v. *Seely*, 2 Wend. 481); or, unless the person to whom the money was due, has given up all claim upon the defendant and accepted the plaintiff as principal debtor in his place (*White* v. *Carlton*, 52 Ind. 371; *Neale* v. *Newland*, 4 Ark. 506; *Hall* v. *Whitaker*, 7 Ired. [N. C.] L. 353); nor unless it is due. *Royal, etc., Packet Co.* v. *Acraman*, 2 Exch. 569. Nor can an action for money paid be maintained by a person to recover a moiety of a sum which he has been compelled to pay by reason of a wrongful act committed by himself and the defendant jointly, even though the judgment is against both. *Merryweather* v. *Nixan*, 8 Term R. 186. But, in order to prevent a recovery in such cases, the act must have been obviously wrongful. *Betts* v. *Gibbins*, 2 Ad. & El. 57. If the parties are only wrong-doers *by inference of law*, the rule preventing contribution does not apply. *Pearson* v. *Skelton*, 1 M. & W. 504.

The indorsers of an accommodation note, knowing at the time of the indorsement that the maker was a mere accommodation maker, cannot, upon payment of his proportion of such note, recover the amount of the maker, who has also paid an equal sum. Under such circumstances the indorsement is joint, and neither party has paid more than he was compellable to pay. *Talcott* v. *Cogswell*, 3 Day (Conn.), 512. Where there is neither fraud nor warranty, a person who has purchased stock of another, which by the books of the company appear to be fully paid up, cannot, because subsequently the company votes not to allow certain credits on the stock, whereby he is compelled to pay a certain sum to have his stock fully paid up, recover the sum so paid, of the seller,

Cunningham v. *Spier*, 13 Johns. 392. The drawer of an accommodation bill of exchange cannot recover for money paid thereon, when he makes such payment without any notice of dishonor having been given him, and without any request from the acceptor. *Sleigh* v. *Sleigh*, 5 Exch. 514; 19 L. J. Exch. 345.

As has been previously stated, a recovery for money paid to the use of another cannot be had, unless money or its equivalent has actually been paid by him to the defendant. The mere fact that the plaintiff is liable to pay is not enough, and he cannot avail himself of a payment made by another though he is afterward compelled to reimburse him, thus when the plaintiff accepted a bill for £25, for the accommodation of a person, who was pressed at the time by the defendant, a sheriff's officer, for seven guineas claimed as being due for possession money, and the person for whose benefit the bill was accepted was to get it discounted by the defendant or elsewhere and to give the plaintiff the surplus over the seven guineas, and he, instead of getting it discounted, deposited it with the defendant as security for the seven guineas, who, knowing the plaintiff's relation thereto, indorsed it over and kept the proceeds, and the plaintiff was subsequently sued thereon, and paid the amount to the holder, it was held that he could not maintain an action against the defendant for money paid for his use, but must proceed specially upon an implied promise to indemnify him for his acceptance. *Asprey* v. *Levy*, 16 M. & W. 851.

The holder of the legal title to real estate cannot recover of the equitable owner, who is in possession, the amount of taxes paid by him on the land. *Bryant* v. *Clark*, 45 Vt. 483.

Persons, who have made and exchanged notes for similar amounts, cannot maintain an action against either for sums paid on his own note (*Wooster* v. *Jenkins*, 3 Denio, 187), nor can a person who has sold goods to a firm and taken the note of *one* of the firm for the price, which he transferred, and was subsequently obliged to pay, a judgment thereon having been obtained against him, maintain an action for money paid against the firm. His remedy in that form of action is confined exclusively to the partner making the note, as the law will not imply a request from the other partners, to pay an obligation upon which, *prima facie*, at least, they are not liable (*Peters* v. *Sanford*, 1 Denio, 224); nor can a person who has purchased goods, recover of the vendors, as for money paid to their use, for money paid by him, in effecting an insurance thereon intermediate the sale and delivery, although in law the goods may have been at the seller's risk during that period. The act of the plaintiff in effecting such insurance for their

benefit was officious and gratuitous. *Orguerre* v. *Luling*, 1 Hilt. (N. Y.) 383.

ARTICLE IV.

DEFENSES.

Section 1. In general. In an action against a person for money paid to his use it is competent for the defendant to show that the money sought to be recovered was paid gratuitously and officiously without any request from him. *Richardson* v. *Williams*, 49 Me. 558; *Taylor* v. *Baldwin*, 10 Barb. 626. But in the absence of any proof of such request, express or implied, it will be presumed that money paid in discharge of another person's debt was paid at his request (*Stephen* v. *Bradnax*, 5 Ala. 528); and the defendant must overcome the effect of this presumption by proving that no request was in fact made. *Oden* v. *Elliott*, 10 B. Monr. (Ky.) 313; *Mayor, etc., of Baltimore* v. *Hughes*, 1 G. & J. (Md.) 497; *Bancroft* v. *Abbott*, 3 Allen, 524. The fact that a person held such a relation to the debt, that he had a right to pay it, *prima facie*, establishes his right of recovery against the person upon whom liability primarily rests, or against other joint debtors with him for a moiety thereof; but this may be overcome by showing that no legal liability existed against the plaintiff to pay the claim, as, where the action is by an indorser of a note or bill, that he was never legally charged as such, and consequently in law he was discharged from all obligation or liability to pay (*Ege* v. *Koontz*, 3 Penn. St. 109; *Sleigh* v. *Sleigh*, 5 Exch. 514; 19 L. J. Exch. 346); or that the statute of limitations had run upon the claim, or that the plaintiff has never in fact paid the money sought to be recovered, and that if the theory upon which he seeks to recover of the defendants is correct, that he would not be liable to pay it. Thus, the drawer of a protested draft telegraphed to a bank to protect his unpaid draft, and the draft was accordingly paid by the bank. An action was afterward brought by the drawer against the payee, to recover the money back, on the ground that the draft had been previously paid. It was held, however, that the action would not lie, as the drawer under these circumstances would not be liable to re-imburse the bank. *Johnson* v. *Bank of N. America*, 5 Robt. (N. Y.) 554. As before stated, a person who pays a debt for another without any request, express or implied, cannot recover as for money paid to such person's use, and this applies to a person who becomes a guarantor of such debt or obligation without the request or privity of the other parties liable thereon. Thus where a single bill was executed by a principal and surety, and afterward an-

other person at the instance of the agent *of the holder*, but without the knowledge and assent of the makers, guaranteed the bond by indorsing upon it "This is a good bond," and signing his name, it was held that he could not, upon being compelled to pay the bond, recover from the surety as for money paid to his use, because he was not a regular indorser, and having become a guarantor without any express request from the makers, the law would not imply a request, and the payment of the bond under compulsion was of his own seeking, and so far as the makers were concerned, gratuitous and officious. So, the defendant may show that the plaintiff paid the money after suit brought when he knew that there was, or might be a defense against the claim, and did not call him in to defend the action. Thus, it was held in *Barmon* v. *Lithauer*, 1 Abb. Ct. App. (N. Y.) 99, that, where one who has paid his creditors a note held by them, on their promise to surrender the note, but which was not done, was afterward sued upon the note by a third person, it was his duty to call upon the original creditors to defend the suit, and that, upon his failure to do so, judgment goes against him by reason of his own neglect to successfully defend the action; he is not entitled to recover from the original creditors the amount paid in satisfaction of the judgment, and also that the fact that he called one of them as a witness in the action was not equivalent to giving them the necessary opportunity to defend the action. This rule only applies, however, to that class of cases where the person paying the money is bound to know, or does know, that the persons to whom he must look for indemnity have, or may have, a defense to the action. *Hutton* v. *Eyre*, 6 Taunt. 289; *Dawson* v. *Morgan*, 9 B. & C. 618. The defendant may show that he expressly notified the plaintiff not to pay the claim, and if he pays it against such notice, he cannot recover the amount as for money paid at the defendant's request, or to his use. Thus, in *Stokes* v. *Lewis*, 1 T. R. 20, it was held that an action for money paid would not lie under such circumstances; as, where two parishes had been for a long time united, and had jointly paid one sexton, but afterward, one of them gave notice to the other that they intended to elect a separate sexton. But the other parish went on as usual and brought an action to recover of the other their quota of the expense. The court held that the money, being paid contrary to the express notice of the defendant, could not be recovered as for money paid to its use, because there was no request, but a complete withdrawal of any former request. The court in *Ege* v. *Koontz*, 3 Penn. St. 109, expressed the rule admirably, thus "A person will not be allowed," says the court, "gratuitously to alter the position of another, and affect his rights and liabilities

by voluntarily assuming to understand his own legal duties, and after paying a claim on the footing of such assumption, to draw it into question upon the allegation of a mistake of his duty." It is a complete defense to an action for money, paid by a surety by the sale of his goods upon an execution issued upon a judgment upon the obligation, that the goods had been sold by the surety before their sale upon execution, and that subsequently to the sale on execution they were recovered by him of the vendee at such sheriff's sale (*Head* v. *McDonald*, 7 Monr. [Ky.] 205); or that the money paid was not the plaintiff's (*Goepell* v. *Swinden*, 1 Dowl. & L. 888); and particularly is this so if the money paid belonged to the defendant as much as it did to the plaintiff, or if he was at the time indebted to the defendant in a sum sufficient to cover the sum paid. Id.

CHAPTER XCVIII.

MONEY RECEIVED.

ARTICLE I.

OF MONEY RECEIVED, IN GENERAL.

Section 1. Nature of the action. An action of assumpsit for money had and received is an equitable remedy that lies in favor of one person against another, when that other person has received money either from the plaintiff himself or third persons, under such circumstances, that in equity and good conscience he ought not to retain the same, and which, *ex aequo et bono*, belongs to the plaintiff. *Buel* v. *Boughton*, 2 Denio, 91; *Lockwood* v. *Kelsea*, 41 N. H. 185; *Mason* v. *Waite*, 17 Mass. 563; *Tevis* v. *Brown*, 3 J. J. Marsh. (Ky.) 175; *Irvine* v. *Hanlin*, 10 S. & R. (Penn.) 219; *Eagle Bank* v. *Smith*, 5 Conn. 71; *Eddy* v. *Smith*, 13 Wend. 488; *Spottswood* v. *Herrick*, 22 Minn. 548; *Knapp* v. *Hobbs*, 50 N. H. 476; *Tamm* v. *Kellogg*, 49 Mo. 118; *Puckett* v. *Roquemore*, 55 Ga. 235; *Laport* v. *Bacon*, 48 Vt. 176; *Stuart* v. *Sears*, 119 Mass. 143; *Grant Co.* v. *Sels*, 5 Oreg. 243; *Saline Co.* v. *Wilson*, 61 Mo. 237; *Varney* v. *Hathorn*, 65 Me. 481; *Perley* v. *County of Muskegon*, 32 Mich. 132; 20 Am. Rep. 637; *McDonald* v. *Lynch*, 59 Mo. 350; *Robinson* v. *Ezzell*, 72 N. C. 231; *Meek* v. *McClure*, 49 Cal. 624; *Briggs* v. *Boyd*, 56 N. Y. (1 Sick.) 289; *Calais* v. *Whidden*, 64 Me. 249; *Allen* v. *Stenger*, 74 Ill. 119. But in order to maintain the action, either an express or an implied promise to pay it to the plaintiff must be shown. *Bloomer* v. *Denman*, 12 Ill. 240; *Whitehead* v. *Peck*, 1 Ga. 140. It is not, however, essential that any privity of contract should be shown; if the plaintiff's right to the money is established, and the defendant is shown to have received it under such circumstances that he ought not to retain it, the law implies a promise to pay it to the party who ought to have it. *Calais* v. *Whidden*, 64 Me. 249; *Mason* v. *Waite*, 17 Mass. 563; *Eagle Bank* v. *Smith*, 5 Conn. 71; *Colgrove* v. *Fillmore*, 1 Aik. (Vt.) 347. Thus, where money is paid by one upon a judgment that is subsequently reversed, it may be recovered back (*Lott* v. *Swezey*, 29 Barb. 87), the

law implying the requisite promise to repay it to the party who paid it. *Garr* v. *Martin*, 20 N. Y. (6 Smith) 306. So, where a person has paid money upon a consideration that has failed (*Smith* v. *McCluskey*, 45 Barb. 610; *Hotchkiss* v. *Judd*, 12 Allen, 447; *Allen* v. *Citizens, etc., Co.*, 22 Cal. 28; *Lyon* v. *Annable*, 4 Conn. 350; *Jewett* v. *Lawrenceburgh, etc., R. R. Co.*, 10 Ind. 539; *Leach* v. *Tilton*, 40 N. H. 473; *Steele* v. *Hobbs*, 16 Ill. 59); or that is void for illegality or other cause, the law implies a promise on the part of the person to whom, or to whose use it was paid, to refund it. *Cross* v. *Bell*, 34 N. H. 83; *Leonard* v. *Canton*, 35 Miss. 189; *Page* v. *Einstein*, 7 Jones' (N. C.) L. 147; *Mobile Branch Bank* v. *Collins*, 7 Ala. 95; *Richards* v. *Allen*, 17 Me. 296; *Brown* v. *Timmany*, 20 Ohio, 81; *Pepper* v. *Haight*, 20 Barb. 429. But, where the ground of recovery is the illegality of the consideration at the common law, in order to uphold the action, the plaintiff must show that he is not *in pari delicto* with the defendant. If he is shown to have been in equal fault with the defendant, the law will not imply a promise to repay the money, or in any wise afford him any relief. *Barnard* v. *Crane*, 1 Tyler (Vt.), 457; *Liness* v. *Hesing*, 44 Ill. 113; *Jacobs* v. *Stokes*, 12 Mich. 381; *Perkins* v. *Savage*, 15 Wend. 412; *Burt* v. *Place*, 6 Cow. 431; *Knowlton* v. *Congress, etc., Spring Co.*, 57 N. Y. (12 Sick.) 518; *Commissioners of Catawba* v. *Setzer*, 70 N. C. 426; *Lusk* v. *Patton*, 70 id. 701.

In any event, in order to maintain the action there must be *money* in the defendant's hands to which the plaintiff is *immediately* entitled (*Maddox* v. *Kennedy*, 2 Rich. [S. C.] 102; *Wilder* v. *Aldrich*, 2 R. I. 518; *Shepard* v. *Palmer*, 6 Conn. 95; *Morrison* v. *Berkley*, 7 S. & R. [Penn.] 246; *Beardsley* v. *Root*, 11 Johns. 464; *Barlow* v. *Stalworth*, 27 Ga. 517; *Willie* v. *Green*, 2 N. H. 333; *Wheat* v. *Norris*, 13 id. 178); or if it is property, that the property has really been converted into money before suit brought, or that it was received in lieu of money. *Dean* v. *Mason*, 4 Conn. 428; *Kearney* v. *Tanner*, 17 S. & R. (Penn.) 94; *Moyer* v. *Shoemaker*, 5 Barb. 319; *Wheat* v. *Norris*, 13 N. H. 178, *Beals* v. *See*, 10 Penn. St. 56; *Hill* v. *Kennedy*, 32 Ala. 523; *Johnson* v. *Haggin*, 6 J. J. Marsh. (Ky.) 581; *Turner* v. *Egerton*, 1 G. & J. (Md.) 433; *Hemmenway* v. *Bradford*, 14 Mass. 121. If money is paid to an agent for his principal, or if money is given by one to another to keep for him, and the agent or depositary deposits it in bank in his own name, the principal may recover it of the bank in this form of action. *Calland* v. *Loyd*, 6 M. & W. 26. But if an agent or depositary pays out the money of the principal for goods, or upon his own debts, the principal cannot recover the

same of the person to whom it was paid, unless such person knew that the money belonged to the principal and parted with no consideration for it. *Ely* v. *Norton*, 3 Keyes (N. Y.), 397; 2 Abb. Ct. App. 19.

§ 2. **When it lies for money.** Whenever a person has money in his possession, however he may have come by it, that belongs to another, and which, *ex æquo et bono*, he has no right to retain, the person to whom it belongs may maintain an action for it, as for money had and received. Thus, where a person has purchased property from one who had no title thereto, and has sold it and converted it into money, the true owner may maintain an action for money had and received, instead of an action for the property or its value. But in such case his recovery would be limited to the sum actually received for the property irrespective of its actual value. *Knapp* v. *Hobbs*, 50 N. H. 476. In the case last cited, the defendant took an ox to market at the request of the owner, and having sold it and received the money therefor, paid it over to the owner. The ox was in fact mortgaged at the time to the plaintiff, who brought an action against the defendant for money had and received, and it was held that it was maintainable, although the defendant acted in good faith and in ignorance of the plaintiff's mortgage. When a person not having title to property sells it and receives the money therefor, the true owner may recover the amount received by him, in this form of action. *Tamm* v. *Kellogg*, 49 Mo. 118. The action does not lie except for money due absolutely without qualification or conditions. *Ralston* v. *Bell*, 2 Dall. (Penn.) 242. Thus, where an agent, executor, or other person intrusted with property to be sold for the benefit of another, the person for whose benefit the property was sold cannot maintain an action for money had and received until the *money* is actually paid therefor. If it is sold upon credit, or is exchanged for other property, this action does not lie until the money is actually realized by the agent or other person making the sale (*Ralston* v. *Bell*, 2 Dall. [Penn.] 242; *Langchamp* v. *Kenny*, 1 Doug. 138); neither will it lie when the property has been sold in part for money and in part for other property. *Weston* v. *Downes*, 1 Doug. 23; *Power* v. *Wells*, 1 id. 24, *n.* 8. Thus, in the case last cited, the plaintiff gave a horse of his own and twenty guineas, for a horse of the defendant, which was warranted sound, but proved to be unsound. The plaintiff tendered back the horse and brought an action for money had and received for the twenty guineas, and also an action of trover for his own horse. The court held that neither action would lie, neither will the action lie when the money sought to be recovered was paid or received *on a contract that is still open.* Thus, where the defendant sold the plaintiff

a pair of coach horses for seventy pounds, which he agreed to take back if the plaintiff should disapprove of and return within a month; and the plaintiff did return them within the month, but, instead of demanding the repayment of the money, took another pair in their stead without making any new agreement, which he also returned within a month, and received still another pair instead of those without any new bargain, which latter pair *he offered to return*, but which the defendant refused to receive, it was held that an action for money had and received would not lie because the contract was still open, and the plaintiff's remedy was by an action upon the contract for damages. *Weston* v. *Downes*, 1 Doug. 23. But if the defendant had received the horses back when tendered to him, the action would have lain, for the contract would then have been closed. *Towers* v. *Barrett*, 1 T. R. 133. The burden is upon the plaintiff to show that *money* was received by the defendant, and evidence that he received certain property, as a horse (*Doebler* v. *Fisher*, 14 S. & R. [Penn.] 179); stock (*Morrison* v. *Berkly*, 7 id. 246); or other property, unless it was received as and in lieu of money (*Wheat* v. *Norris*, 13 N. H. 178; *Filyo* v. *Penny*, 2 Murph. [N. C.] 182; *Clark* v. *King*, 1 Rice [S. C.], 178), does not sustain the action. It does not lie for money paid to another, as by a surety for money paid on account of his liability for his principal (*Childs* v. *Eureka, etc.*, *Works*, 44 N. H. 354; *Willis* v. *Crooker*, 1 Pick. 205); nor for money due from another for goods sold (*Doebler* v. *Fisher*, 14 S. & R. [Penn.] 179; *Turner* v. *Egerton*, 1 G. & J. [Md.] 433; *Beals* v. *See*, 10 Penn. St. 56); nor for money due for labor or for other benefit conferred, as for a premium of insurance. *Smith* v. *Odlin*, 4 Yeates (Penn.), 468. But where one has the property of another in his possession and converts it into money, even without authority, an action for money had and received lies for the sum actually received. *Clark* v. *King*, 1 Rice (S. C.), 178; *Porter* v. *Brown*, Add. (Penn.) 37; *Lemington* v. *Stevens*, 48 Vt. 38. So, a count for money had and received lies to recover the amount of a promissory note. *Tebbetts* v. *Pickering*, 5 Cush. 83; *Cummings* v. *Gassett*, 19 Vt. 308; *Edgerton* v. *Brackett*, 11 N. H. 218. But not against one who is a mere surety thereon. *Hatten* v. *Robinson*, 4 Blackf. (Ind.) 479. So it lies upon an accepted draft, even in the hands of an assignee (*Weston* v. *Penniman*, 1 Mas. [C. C.] 306); and upon an account stated (*Jackson* v. *Mayo*, 11 Mass. 152; *Filer* v. *Peebles*, 8 N. H. 226); upon an order for money (*Henry* v. *Hazen*, 5 Ark. 401), or other obligation that evidences a money contract upon which money is immediately and absolutely due. *Boyd* v. *Gilchrist*, 15 Ala. 849; *Shanks* v. *Dent*, 8 Gill (Md.), 120; *Marcum* v. *Beime*,

6 J. J. Marsh. (Ky.) 604. But the count is not sustained by a note or other obligation that is payable in specific articles or any thing but money. *Wilson* v. *George*, 10 N. H. 445.

It lies for money paid to one for a purpose that never was and never can be accomplished, as where money is paid to a person as president of an association in order that the person paying it may become a member, and afterward, without such person ever having become a member, the association is dissolved, the person receiving the money is liable to the person paying it to him, for money received. *Churchill* v. *Stone*, 58 Barb. 233. So, for money paid to an attorney for bringing an action, which he never brought (*Danville* v. *Merrick*, 25 Mo. 680); so, for money paid for efforts to be used in obtaining a pardon for a person, where no efforts to that end were in fact made. *Adams Express Co.* v. *Reno*, 48 id. 264. So it lies for money received by the assignee of a person for goods purchased by his assignor under fraudulent representations. *Hall* v. *Peckham*, 8 R. I. 370. So, where a trustee, mortgagee or pledgee who holds the property of another as security for loans or advances made thereon, sells the property before the equities of the *cestui que trust*, or mortgagor or pledgor are quieted, he is liable as for money had and received, for any balance remaining after satisfying his own claim. *Jackson* v. *Stevens*, 108 Mass. 94; *Walcott* v. *Ronalds*, 2 Robt. (N. Y.) 617; *Jewett* v. *Cunard*, 3 W. & M. (U. S. C. C.) 277. So it lies against the assignor of a debt or claim who afterward receives the money thereon from the debtor. *Bullard* v. *Hascall*, 25 Mich. 132. It lies against a bailee of goods to whom they were sent for sale, when he sells the goods and takes his pay in a currency that subsequently becomes worthless, but which he mingled with his own money and used for his own purposes. *Wyly* v. *Burnett*, 43 Ga. 438. So, it lies by the true owner of land against one claiming title thereto, but who really has none, and who has received the amount awarded by commissioners, upon a taking of the land for public purposes. *Tamm* v. *Kellogg*, 49 Mo. 118. So it lies for money paid for property when the vendor made false and fraudulent representations as to its quality (*Rose* v. *Depue*, 1 Sup. Ct. N. Y. [T. & C.] 16), or for money wrongfully collected by an individual or corporation. *Dewey* v. *Supervisors*, 4 id. 606; 2 Hun, 392. So, for money advanced or contributed for an unlawful purpose, provided the action is brought before it has been actually used or expended for such purpose (*Bailey* v. *O'Mahony*, 1 Jones & Sp. [N. Y.] 239; S. C., 10 Abb. [N. S.] 270; *N. W. Union Packet Co.* v. *Shaw*, 37 Wis. 655; 19 Am. Rep. 781); but where money has been loaned or deposited for a specific purpose, which is unlawful, after it has been applied

to such purpose no action lies therefor. *Verona* v. *Peckham*, 66 Barb. 103. See, also, *Puckett* v. *Raquemore*, 55 Ga. 235. Where money has been fraudulently obtained from an individual or a bank, an action for money received may be maintained immediately upon discovery of the fraud, whether the note given therefor is due or not. *Gibson* v. *Stevens*, 3 McLean (C. C.), 551. So it has been held maintainable for money drawn as a prize, by fraudulent practices. *Catts* v. *Phalen*, 2 How. (U. S.) 376.

§ 3. **Property received as money.** While it is true generally, as previously stated, that an action for money had and received only lies when the defendant has received money itself, yet the rule is subject to the exception that, whenever property has been received as money, or in lieu of money, the action may be maintained. Thus, where A delivers to B a note against C for collection, and B receives from C a horse or other property in full payment of the note, without authority to that end from A. B is liable to A in an action for money had and received to the full amount of the note and interest, precisely the same as though he had received the money on it. By taking payment in whole or in part, in that way, he is treated as purchasing the property himself, with A's money, and is liable the same as though so much money had been received by him. *Clark* v. *King*, 1 Rice (S. C.), 178; *Strickland* v. *Burns*, 14 Ala. 511. And where other property is thus received in part payment of a note or other obligation an action for money had and received is maintainable for the amount for which such property was taken, as, in this form of action, the plaintiff may always recover whatever sum of money he can show to be in the defendant's hands, to his use, at the time when the action was brought. *Tuttle* v. *Ridgeway*, 62 Ill. 515.

Bank bills, or securities for money, are not money, unless made so by statute, so that an action for money had and received will not lie for them, unless they were received as, or have been converted into, or used as money. *McLachlan* v. *Evans*, 1 Y. & J. 380; *Murray* v. *Pate*, 6 Dana (Ky.) 335. Thus, where a person by mistake gave another a fifty-dollar bank note supposing it to be one for five dollars only, it was held that the difference could not be recovered as for money received. *Filgor* v. *Penny*, 2 Murph. (N. C.) 182. So, where this form of action was brought to recover the value of foreign securities, it was held that it would not lie, unless such securities had been actually converted into money. *McLachlan* v. *Evans*, 1 Y. & J. 380. But a debt due in foreign money is recoverable in this form of action (*Harington* v. *Macmorris*, 5 Taunt. 228), the measure of the recovery being the sum which, in the currency of the country in which the action is

brought, would represent the value of the debt in the country in which it was payable. *Scott* v. *Bevan*, 2 B. & Ad. 78. This form of action does not lie for goods sold upon credit, or otherwise, although the price is payable in money. The remedy is for goods sold. *Floyd* v. *Day*, 3 Mass. 405; *Beals* v. *See*, 10 Penn. St. 56; *Kearney* v. *Tanner*, 17 S. & R. (Penn.) 94. Neither does it lie against the bailee of a bill of exchange who has wrongfully deposited it to his own credit, with his bankers, unless it was due at the time when the action was brought (*Atkins* v. *Owen*, 2 Ad. & El. 35; 6 Nev. & M. 307); and, generally, it may be said that this action will not lie except for money in the hands of the defendant belonging to the plaintiff (*Wilder* v. *Aldrich*, 2 R. I. 518; *Hatten* v. *Robinson*, 4 Blackf. [Ind.], 479); yet, in all cases where property has been received by the defendant *as money*, or in lieu of money, it will, for the purposes of recovery, be treated as so much money received by him to the use of the plaintiff. *Harris* v. *Wicks*, 28 Wis. 198; *Hemenway* v. *Bradford*, 14 Mass. 122; *Barlow* v. *Stalworth*, 27 Ga. 517; *Beardsley* v. *Root*, 11 Johns. 464; *Ainslee* v. *Wilson*, 7 Cow. 662; *Willie* v. *Green*, 2 N. H. 333; *Kearney* v. *Tanner*, 17 S. & R. (Penn.) 94.

§ 4. **Waiving torts.** There is now no question but that when a person has wrongfully obtained possession of the property of another, and has sold and received the money for it, the real owner may waive the tort, and bring an action for money had and received against him, for the amount thus received by him. He has his election to treat him as a wrong-doer, and sue him in trespass, or for the conversion of the property, or, he may affirm his acts and claim the benefit of the transaction. *Lythgoe* v. *Vernon*, 5 H. & N. 180; *Brewer* v. *Sparrow*, 7 B. & C. 310. See, also, *ante*, Vol. 1, pp. 405–409; also, *Jamison* v. *Moon*, 43 Miss. 598; *Fox* v. *Northern Liberties*, 3 Watts & Serg. (Penn.) 102; *Smith* v. *Hooks*, 19 Ala. 101; *Mississippi, etc., R. R. Co.* v. *Fort*, 44 Miss. 423; *Whitney* v. *Allaire*, 4 Denio, 554. But the waiver must be complete, and extend to the whole tort. He cannot affirm in part, and disaffirm in part. *Lythgoe* v. *Vernon*, 5 H. & N. 180. And having once made his election, he is bound thereby and cannot afterward maintain an action for the tort. *Fireman's Ins. Co.* v. *Cochran*, 27 Ala. 228; *Rodermund* v. *Clark*, 46 N. Y. (1 Sick.) 354; *Tryon* v. *Baker*, 7 Lans. (N. Y.) 511; *Wellington* v. *Drew*, 16 Me. 51; *Brown* v. *Moran*, 42 id. 44; *Foreman* v. *Neilson*, 2 Rich. (S. C.) 289; *Gilmer* v. *Ware*, 19 Ala. 252; *Goss* v. *Mather*, 2 Lans. (N. Y.) 283; S. C. affirmed, 46 N. Y. (1 Sick.) 689; *Patterson* v. *Peironnet*, 7 Watts (Penn.), 337. By electing to take the money for which the goods wer sold, he ratifies and affirms the acts of the wrong-doer,

and from that time he cannot treat the transaction as a wrong (*Brewer* v. *Sparrow*, 7 B. & C. 310; *Lythgoe* v. *Vernon*, 5 H. & N. 180); and, *e converso*, after having elected to treat it as a tort, he cannot affirm the act of the wrong-doer, and sue him for the money received.

§ 5. **Voluntary payment of money.** Money voluntarily paid by one, which at law could not have been recovered of him, cannot, in the absence of fraud, or mistake, be recovered back (*Fleetwood* v. *New York*, 2 Sandf. [N. Y.] 475; *Mays* v. *Cincinnati*, 1 Ohio St. 268; *Hope* v. *Evans*, 1 S. & M. [Miss.] Ch. 195; *Sheldon* v. *School District*, 24 Conn. 88; *Corkle* v. *Maxwell*, 3 Blatchf. [C. C.] 413; *Sturges* v. *United States*, Dev. [Ct. Cl.] 20); as, where money is paid to take up a note, upon which the person paying the money is not legally liable (*Clancy* v. *McEnery*, 17 Wis. 177; *Watson* v. *Cunningham*, 1 Blackf. [Ind.] 321); or for a license which is issued upon the application of a person, and is paid without objection or protest (*Mays* v. *Cincinnati*, 1 Ohio St. 268); or to redeem lands sold under void assessments, the payor knowing the facts (*Fleetwood* v. *New York*, 2 Sandf. [N. Y.] 475; *Indianapolis* v. *Langsdale*, 29 Ind. 486); or to a railroad company for freight upon goods, in excess of the rates permitted by its charter (*Kenneth* v. *S. C. R. R. Co.*, 15 Rich. [S. C.] L. 284); unless such payment is necessary in order to enable the owner to obtain his goods (*Tutt* v. *Ide*, 3 Blatchf. [C. C.] 249); or by an executor to a legatee with knowledge of outstanding claims against the estate, even though there proves to be a deficiency of assets (*Wilcocks* v. *Phillips*, 1 Wall. Jr. [C. C.] 47); or to a collector of revenue taxes, without protest or objection (*United States* v. *Clement*, Crabbe [C. C.], 499); or under an invalid mortgage foreclosure (*Branham* v. *Mayor, etc.*, 24 Cal. 585); or for the release of a claim made by a person, who in fact had no valid claim, unless the person receiving the money was guilty of fraud. *Brown* v. *Rich*, 40 Barb. 28; *Stewart* v. *Crosby*, 50 Me. 130. The rule is, that when money has been obtained by fraud, oppression or extortion, or, when it has been paid to secure a right which the party paying it was entitled to with out such payment, and which was withheld until such payment was made, the payment is involuntary, and the money may be recovered back. *Corkle* v. *Maxwell*, 3 Blatchf. (C. C.) 413.

Thus, where a common carrier agreed to transport certain goods from a certain point to a certain other point, for a sum agreed upon, but, when the goods arrived, he refused to deliver them unless a higher price for their carriage was paid, and the sum demanded was paid, it was held that the payment was not voluntary, and the excess above the price fixed by the contract might be recovered back (*Tutt* v. *Ide*, 3 Blatchf. [C. C.] 249; *Harmony* v. *Bingham*, 12 N. Y. 99; *Lafay-*

ette, etc., R. R. Co. v. *Pattison*, 41 Ind. 312), under the rule that money extorted under duress of goods does not constitute a voluntary payment; as where goods are pawned, and in order to obtain them the pawnor pays more than the legal rate of interest (*Astley* v. *Reynolds*, 2 Str. 915); or if goods are seized by a public officer for the payment of a tax, or for customs duties, or for any cause, illegally, money paid for their release is not a voluntary payment (*Irving* v. *Wilson*, 4 T. R. 485); unless paid with full knowledge of the facts and without protest or objection, in which case, even though the payment is made under a misapprehension of the law, and under a supposition that he was legally bound to pay the money, the payment is deemed voluntary and the amount cannot be recovered back. *Bucknall* v. *Story*, 46 Cal. 589; 13 Am. Rep. 220. Thus in the case last cited the plaintiff, with full knowledge of the facts, but under a misapprehension of his legal rights and liabilities, paid an assessment upon his property for widening a street, and it was held that although the payment was made under protest, yet, not having been made under the compulsion of legal process, it could not be recovered back. So, when a tenant pays, under protest, a sum demanded as rent, which he is not legally bound to pay, but through fear that the landlord will, as he has threatened to do, dispossess him, the payment is voluntary. *Emmons* v. *Scudder*, 115 Mass. 367. The rule is that a mere apprehension that legal proceedings will be resorted to is not enough; there must either exist a duress of goods or of the person, or actual fraud (*Briggs* v. *Boyd*, 56 N. Y. [11 Sick.] 289); and if legal proceedings have not been commenced, there must be threats to resort to them, of such a character as to warrant a reasonable apprehension that they will be resorted to, and the payment must be made under protest (*Town of Ligonier* v. *Ackerman*, 46 Ind. 552; *Hall* v. *United States*, 9 Ct. of Claims, 270); and the mere fact that the claim is illegal is not enough (*Flower* v. *Lance*, 59 N. Y. [14 Sick.] 603); there must be such duress of goods, or of the person, or actual fraud, as renders the payment not the voluntary act of the party. Thus where a person, who was a co-tenant with the plaintiff, demanded of him a portion of insurance-money received by the plaintiff upon a policy of insurance, to the whole of which the plaintiff was entitled and threatened that, unless the plaintiff paid it to him, he would prosecute him on a charge of having set fire to the property, and have him in jail before night, and he, fearing immediate ill-consequences to his wife's health, paid the money, the court held that the menaces were not of such serious bodily harm as to make the payment involuntary. *Harmon* v. *Harmon*, 61 Me. 227; 14 Am. Rep. 556. See, also, to same effect, *State* v. *Sluder*, 70 N. C. 55. To make the payment of an illegal

demand involuntary, so that it may be recovered back, it must have been made either to release the person or property of the person paying it from detention or seizure by one having apparent authority to seize or detain it (*Wolfe* v. *Marshal*, 52 Mo. 167; *Wabaunsee Co.* v. *Walker*, 8 Kan. 431); or in ignorance of the material facts. *Lake* v. *Artisans' Bank*, 3 Abb. Ct. App. (N. Y.) 10; *Eaton* v. *Eaton*, 35 N. J. Law, 290.

When money is paid to another, however, voluntarily upon a consideration that has failed; as where it is paid for property, the title to which was not in the vendor, and the purchaser did not take the risk in that respect (*Smith* v. *McCluskey*, 45 Barb. 610; *Leach* v. *Tilton*, 40 N. H. 473; *Allen* v. *Citizens, etc., R. R. Co.*, 22 Cal. 28); or where it is paid for property to be delivered, or for services to be rendered, or lands to be conveyed, or upon any consideration to be passed in the future, and performance does not transpire, the money may be recovered back in this form of action. *Hickock* v. *Hoyt*, 33 Conn. 553; *Weatherly* v. *Higgins*, 6 Ind. 73; *Weeks* v. *Hunt*, 13 Vt. 144; *Pennington* v. *Clifton*, 10 Ind. 172. But in order to uphold an action in such cases, it must appear that there was a promise to perform on the part of the person receiving the money, absolute in its character, and that performance was not dependent upon a contingency upon the result of which the payor took his chances. Thus, where one paid to a prize master of a privateer a certain sum for a share of the prizes she might take, but before she was ready to sail, news of peace arrived, whereupon the enterprise was abandoned, it was held that the money could not be recovered back as for a failure of consideration, because it was paid upon a contingency, the result of which either party might equally well have foreseen. *Woodward* v. *Cowing*, 13 Mass. 216.

§ 6. **Money paid with full knowledge of the facts.** Money paid by one to another without duress, fraud, or the compulsion of legal process, with full knowledge of all the facts, cannot be recovered back even though the law would not have compelled the payment (*Eaton* v. *Eaton*, 35 N. J. Law, 290; *Wolfe* v. *Marshal*, 52 Mo. 167; *Newell* v. *March*, 8 Ired. (N. C.) L. 441; *Commercial Bank* v. *Reed*, 11 Ohio 498; *Tyler* v. *Smith*, 18 B. Monr. (Ky.) 793; *Bucknell* v. *Story*, 46 Cal. 589; 13 Am. Rep. 220; *Williams* v. *Colby*, 44 Vt. 40; *Awalt* v *Eutaw Co.*, 34 Md. 435); nor because he was ignorant of his legal rights. *Real Estate Savings Institution* v. *Linder*, 74 Penn. St. 371; *Potomac Coal Co.* v. *Cumberland, etc., R. R. Co.*, 38 Md. 226. Thus, where a person takes a security payable to a third person, and such third person refuses to indorse the same unless he is paid a certain sum, which is paid to him, the amount so paid cannot be recovered back, because the payment is voluntary and made with full knowledge that he has no legal

claim to be paid any thing for the indorsement. *Irwin* v. *Thomas*, 12 Kan. 93. So, where a person knowing the facts pays to another a bonus for an article purchased by him at a sheriff's sale, and it subsequently transpires that the sheriff's sale is invalid, and that the property really belonged to a third person who obtains and retains possession of it, the person paying the *bonus* cannot recover it back, because he knew the facts attending the sale, and that the party bidding off the property acquired no other title than such as the sheriff could give. *Chapman* v. *Speller*, 12 Q. B. 621; 19 L. J. Q. B. 239. But if property is sold by an officer or other person to which he can give no title, the person purchasing can recover back the money from him, unless he has paid it over to the person entitled to the avails of the sale. *Bartholomew* v. *Warner*, 32 Conn. 98. So, where a tenant, who is legally bound to pay the rent to an assignee or mortgagee of his landlord, pays it to the landlord upon an indemnity that turns out to be invalid, he cannot recover back the amount paid in an action for money had and received, even though he was subsequently compelled to pay the rent to the mortgagee, because the payment was voluntary and made with full knowledge of the facts. *Higgs* v. *Scott*, 7 C. B. 63; *Holmes* v. *Field*, 12 Ill. 424. So, where money is voluntarily paid upon a void judgment, with full knowledge of the facts, it cannot be recovered back, although paid in ignorance of the legal rights of the person paying it (*Elston* v. *Chicago*, 40 Ill. 514); nor can money paid under a contract, void under the statute of frauds but which has been performed, be recovered back although the person paying it was not aware that he was under no legal obligation to pay it (*James* v. *Morey*, 44 Ill. 352); nor can money paid for a quit-claim deed be recovered back even though no title is thereby conveyed, unless the person giving the deed was guilty of fraud (*Sheldon* v. *Harding*, 44 Ill. 68); nor for license where the party paying it was under no obligation to do so and knew the facts (*Cook* v. *Boston*, 9 Allen, 393); nor for money paid in satisfaction of an unjust demand (*Patterson* v. *Cox*, 25 Ind. 261); or one to which there was no validity. *Newell* v. *March*, 8 Ired. (N. C.) 441. Thus, where a person purchased a fertilizer which proved to be a worthless article and gave his note therefor, which, under threats of a suit, he paid, after he knew that the article was worthless, it was held that the money could not be recovered back (*Matthews* v. *Smith*, 67 N. C. 374); and, generally, it may be said that when a person *knows* that a claim made upon him is unjust, fraudulent or illegal, the law requires him to resist it, and if he pays it voluntarily, he cannot recover it back. He has thus elected to waive his legal rights and must abide the results of his election. *Williams* v. *Colby*, 44 Vt. 40. Thus, where a person

crossed a river on the ice, and toll being demanded of him for a bridge company under color of its charter, he paid it, and brought an action to recover it back, it was held that the action would not lie, as he should have resisted the demand and compelled a trial of the right of the company to demand the toll in an action, and having paid it merely to secure his passage, the payment was voluntary.

§ 7. **Payments made with means of knowledge.** While the means of ascertaining facts is not equivalent to actual knowledge of them (*Rutherford* v. *McIvor*, 21 Ala. 750), and while a person paying money to another has a right to rely upon such person's assurances, yet, in the absence of any assurances or statements made in reference to the matter, if the means of ascertaining the facts are readily accessible, his failure to take any measures to ascertain them may constitute such negligence on his part that money paid under such circumstances cannot be recovered back, and will be treated by the courts as having been voluntarily paid, with knowledge of the facts. *Mutual Life Ins. Co.* v. *Wager*, 27 Barb. 354; *Peterborough* v. *Lancaster*, 14 N. H. 382; *West* v. *Houston*, 4 Harr. (Del.) 170. This rule, however, is only applied where the person paying the money has been guilty of inexcusable negligence, as where money is paid to redeem land from a mortgage or levy, without examining the records to ascertain whether the mortgage or levy is properly recorded, or whether the instrument or conveyance under which the right to redeem them is supposed to exist has ever been recorded, so as to make the payment available. Thus, where A, the owner of land upon which there was a mortgage, gave B a deed of it, taking back a mortgage to secure the price agreed to be paid therefor, and subsequently sold the mortgage to C, and the mortgage was properly recorded, but the deed was not, and, after the sale of the land, a creditor of A attached his equity of redemption in the land, which attachment or levy subsequently ripened into a perfect title as against everybody but the first mortgagee; and the assignee of A's mortgage, without any examination of the records to ascertain whether he had any title or right under the mortgage, and in ignorance of the levy, paid the amount of the first mortgage and procured it to be discharged, it was held that he could not maintain an action against the mortgagee to whom the money was paid, to recover back the money, because the payment was not induced by fraud, but was the result of his own negligence in not making an examination of the records to ascertain the state of the title. *Wilson* v. *Barker*, 50 Me. 447. The same rule also prevails where a person, who, without any fraud on the part of the grantor, and supposing that he is acquiring a title, pays money for a quit-claim deed of land to which the grantor

had no legal title. *Sheldon* v. *Harding*, 44 Ill. 68. In all cases, however, if there is any fraud or bad faith on the part of the person receiving the money, or if there are any circumstances that tend to excuse inquiry, where the law has provided the means for ascertaining the facts, the rule does not apply, and, if there is a mistake in fact, a recovery may be had.

Thus, where a demand is made upon one for the payment of a tax or assessment upon his land, by a person having authority to make such demand, and the amount claimed is paid without any inquiry or examination as to whether the tax or assessment really exists upon it, will not debar him from recovering back the money, if it turns out that in point of fact no such tax or assessment did exist, even though by an examination of the records, the fact would have been ascertained, because he had a right to rely upon it that the demand would not have been made unless a legal claim existed against him, and he could not be charged with inexcusable neglect (*Allen* v. *The Mayor of New York*, 4 E. D. S. [N. Y.] 404); and it seems that, even though there is negligence on the part of the person paying the money, he may recover it back, if the payee will not be prejudiced, or lose any rights thereby (*Duncan* v. *Berlin*, 11 Abb. Pr. [N. S. N. Y.] 116; S. C., 46 N. Y. [1 Sick.] 685); therefore, in no case is a person estopped by negligence, from recovering back money paid to another under a mistake of facts, when such person has no right to have money paid to him by the person paying it, or by any other person for whom the payor professes to act, or in whose right he is acting, in making such payment. Thus, where a person being indebted to another on account makes out a statement of his account against his creditor, and by mistake omits an item therefrom, and so overpays the person's claim, an action for money had and received will lie to recover back the excess, although the mistake resulted from the payor's carelessness. *Lawrence* v. *American National Bank*, 54 N. Y. (9 Sick.) 432. The fact that he had the means of ascertaining the truth, but omitted to exercise due diligence in ascertaining it, does not preclude him from recovering back the money, so long as the payee is not prejudiced, and loses no rights thereby. *Union National Bank* v. *Sixth National Bank*, 43 N. Y. (4 Hand) 452; 3 Am. Rep. 718; *Kingston Bank* v. *Eltinge*, 40 N. Y. (1 Hand) 391. Mere negligence in ascertaining the facts or mere forgetfulness does not operate as an estoppel, nor does the fact that the payor had the means of ascertaining the facts and neglected to use them. The payment, in order to operate as an estoppel, must have been made intentionally, and under such circumstances as show a determination to pay, without choosing to investigate the facts. *Kelly* v. *Solari*, 9 M. & W. 54. See, especially,

the opinion of PARKE, B., in the case last cited; see, also, holding a similar doctrine, *Lucas* v. *Worswick*, 1 Mood. & R. 293, and comments upon this case in 2 Smith's Lead. Cas., p. 243; also *Wheadon* v. *Olds*, 20 Wend. 175.

§ 8. **Receiving with knowledge of title.** When a person receives money from an agent to satisfy an obligation against him, knowing that it belongs to his principal, he is liable to the principal therefor in an action for money had and received (*Rusk* v. *Newell*, 25 Ill. 226; *Skinner* v. *Merchants' Bank*, 4 Allen, 290; *Muttycall Seal* v. *Dent*, 8 Mo. P. C. 319; *Litt* v. *Martindale*, 18 C. B. 314); but not where the principal had the benefit of the property for which the money was paid. *Bank of Charleston* v. *Bank of the State*, 13 Rich. (S. C.) 291.

Where an agent, pursuant to the instructions of his principal, delivers to a common carrier moneys of the principal, consigned to and to be transported to him, the consignor, from the time of the delivery, ceases to have any title to or interest therein, and cannot maintain an action against the carrier therefor. *Thompson* v. *Fargo*, 63 N. Y. (18 Sick.) 479; affirming S. C., 2 Hun, 379; 4 Sup. Ct. N. Y. (T. & C.) 665; 48 How. 93. And the fact that the moneys were the fruits of a fraud perpetrated by the principal through the instrumentality of the agent, although the latter was innocent of the fraud, gives him no title to the moneys which will authorize him to maintain the action. Id.

§ 9. **Receiving fees of office.** An action for money had and received may be maintained by one entitled to the fees of an office against one to whom they have been paid without authority from him. *Hall* v. *Swansea*, 5 Q. B. 526; *Boyter* v. *Dodsworth*, 6 T. R. 681. Thus, where two persons claimed an office and they submitted the question of their respective rights thereto to arbitrators, who decided that the defendant should perform the duties and give a certain moiety of the fees to the plaintiff, it was held that the plaintiff might maintain an action for money had and received against him therefor. *Rowland* v. *Hall*, 1 Scott, 539; 1 Hodges, 111. See, also, to the same effect, *Glascock* v. *Lyons*, 20 Ind. 1; *Platt* v. *Stout*, 14 Abb. Pr. (N. Y.) 178.

§ 10. **Payments made under mistake, generally.** It is well settled that money paid under a mistake of facts may be recovered back, unless the mistake results from the inexcusable neglect of the party paying it, provided there was no legal or moral obligation on his part to pay it. *Manchester* v. *Burns*, 45 N. H. 482; *Holbrook* v. *Allen*, 4 Fla. 87; *Young* v. *Stahelin*, 34 N. Y. (7 Tiff.) 258; *Northrop* v. *Graves*, 19 Conn. 548. Thus, in a case previously cited

(*Lucas* v. *Worswick*, 1 Moo. & Rob. 293), where the defendant had a claim against the plaintiffs which was disputed, the defendant claiming a much larger amount than the plaintiffs conceded to be due, and afterward the defendant received from them a small part of the demand, and subsequently meeting one of the plaintiffs and without mentioning the fact of such partial payment, told him that he had concluded to waive the dispute, and take the sum admitted by them to be due, which, in forgetfulness of the fact of the partial payment, that had previously been made to him, was paid without deduction of such amount, it was held that if the plaintiffs made the payment without any intention of waiving the deduction of the amount previously paid, the fact that they had forgotten it did not preclude them from recovering it back. But where the mistake under which the payment is made is one into which the person receiving it is not bound to inquire, and the person paying it has been guilty of inexcusable negligence (see *Duncan* v. *Berlin*, 5 Robt. [N. Y.] 457); it cannot be recovered back, if the person to whom it was paid will be in any measure prejudiced or lose any rights thereby (*Duncan* v. *Berlin*, 11 Abb. Pr. [N. S. N. Y.] 116; S. C., 46 N. Y. [1 Sick.] 685; *Mayer* v. *Mayor*, 63 N. Y. [18 Sick.] 455); or, if the payor was under any moral obligation to pay the money (*Sientes* v. *Odier*, 17 La. Ann. 153; *New York* v. *Erben*, 10 Bosw. [N. Y.] 189); or if the payment was made from motives of policy. *Elting* v. *Scott*, 2 Johns. 157. See sections 11 and 12 for a further consideration of the question.

§ 11. **Mistake of facts.** As has been previously stated, money paid under a mistake of facts may be recovered back in an action as for money had and received. *Osgood* v. *Jones*, 23 Me. 312; *Baltimore, etc., R. R. Co.* v. *Faunce*, 6 Gill (Md.), 68; *Bank of Commerce* v. *Union Bank*, 3 N. Y. (3 Comst.) 230; *Logan* v. *Sumter*, 28 Ga. 242; *Millett* v. *Holt*, 60 Me. 169; *Vernon* v. *West School Dist.*, 38 Conn. 112; *Lawrence* v. *American National Bank*, 54 N. Y. (9 Sick.) 432; *Duncan* v. *Berlin*, 46 N. Y. (1 Sick.) 685; *Kingston Bank* v. *Eltinge*, 40 N. Y. (1 Hand) 391; *Dickins* v. *Jones*, 6 Yerg. (Tenn.) 483; *West* v. *Houston*, 4 Harr. (Del.) 170; *Henderson* v. *Planters' Bank*, 11 Rich. L. (S. C.) 44; *Garland* v. *Salem Bank*, 9 Mass. 408. But there must have been *a mistake*. "If the money was *intentionally* paid without reference to the truth or falsehood of the fact, the plaintiff meaning to waive all inquiry into it, and that the person receiving the money shall have it, *at all events*, whether the fact be true or false, the latter is entitled to retain it" (PARKE, B., in *Kelly* v. *Solari*, 9 M. & W. 54); and the burden of establishing the mistake is upon the payor (*Mutual Life Ins. Co.* v. *Wager*, 27 Barb. 344;

Taylor v. *Beavers*, 4 E. D. S. [N. Y.] 215); and it must also appear that the plaintiff was not under either a legal or a moral obligation to pay the money, and that, as against the plaintiff, it would be inequitable for him to retain it (*Edgar* v. *Shields*, 1 Grant's Cas. [Penn.] 361; *Foster* v. *Kirby*, 31 Mo. 496; *Jamison* v. *Ludlow*, 3 La. Ann. 492); and if it turns out in point of fact that the payee has released any security, or done any act in consequence of such payment, whereby he would lose any right, or be essentially prejudiced if compelled to refund it, it cannot be recovered back upon the principle that, as between two innocent persons, that one must lose who has committed the error. *Hern* v. *Nichols*, 1 Salk. 289; *McDougall* v. *Cooper*, 31 N. Y. (4 Tiff.) 498; *Wheadon* v. *Olds*, 20 Wend. 174. Thus, where a person by mistake and without any obligation to do so, pays the debt of another, he may recover it back, provided the person to whom it was paid will be left in *statu quo* as to the real debtor. That is, unless he has given up some security or released some right as against the real debtor in consequence of such payment. The mere fact that he may not be able to collect the amount of the real debtor does not affect the question, unless he has released some security or lost some right in consequence of the payment, he is liable to refund the money. *Tybout* v. *Thompson*, 2 Browne (Penn.), 27; *Wheadon* v. *Olds*, 20 Wend. 174; *McDougall* v. *Cooper*, 31 N. Y. (4 Tiff.) 498.

The rule was well expressed in *Guild* v. *Baldridge*, 2 Swan (Tenn.), 295, in which it was said that, "where money is paid to another under the influence of a mistake, that is, on the supposition that a specific fact is true, which would entitle the other to the money, but which fact is untrue, and the money would not have been paid if the fact had been known to the payor, an action will lie to recover it back. But if the money had, under a false impression that he owed money to A, been, by arrangement, paid to B, a creditor of A, who received it in good faith, an action would not lie against B, to recover back the money, because he may, in consequence of such payment, have lost or waived his remedy against A." But, where one pays another by mistake more than is due him (*Young* v. *Stahelin*, 34 N. Y. [7 Tiff.] 258; *Lawrence* v. *American National Bank*, 54 N. Y. [9 Sick.] 432); or pays money under a supposition that it is owing to the person to whom it is paid, when in fact there is nothing due (*Appleton Bank* v. *McGilvray*, 4 Gray, 518); or under an assurance from the person to whom it is paid that he has a legal claim against him, when in fact he has no such claim; as when money is paid under an insurance policy under an assurance from the payee that the loss was the result of accident and honest, when in fact it resulted from design, and was fraudulent

(*Elting* v. *Scott*, 2 Johns. 157; *Sawyer* v. *Dodge Co. Mut. Ins. Co.*, 37 Wis. 503; *McConnel* v. *Del. Ins. Co.*, 18 Ill. 228); so where money is paid for an insurance which by mistake never covered the risk (*Illinois, etc., Ins. Co.* v. *Fix*, 53 Ill. 151; 5 Am. Rep. 38); or when by mistake too much interest is paid upon a debt (*Tinslar* v. *May*, 8 Wend. 561); or a party neglects to deduct a previous payment (*Lawrence* v. *American Natl. Bk.*, 54 N. Y. [2 Sick.] 432; *Kelly* v. *Solari*, 9 M. & W. 54); or pays the full amount of a claim in ignorance of the fact that payments have been made thereon by others (*Young* v. *Stahelin*, 34 N. Y. 258; *Walker* v. *Mock*, 39 Ala. 568); or where it was paid to the wrong person under the supposition that he was entitled to receive it (*Norton* v. *Marden*, 15 Me. 45; *Bank of Louisiana* v. *Ballard*, 8 Miss. 371); and indeed in *all* cases where money is paid under a mistake of facts, or a misapprehension of the state of the contract, and there was neither a legal nor a moral obligation on his part to pay it, it may be recovered back. *Mowatt* v. *Wright*, 1 Wend. 355; *Dickens* v. *Jones*, 6 Yerg. (Tenn.) 483; *Rosboro* v. *Peck*, 48 Barb. 92; *Mitchell* v. *Walker*, 8 Ired. (N. C.) 243; *Pearson* v. *Lord*, 6 Mass. 84; *New York* v. *Erben*, 10 Bosw. (N. Y.) 189; *Manchester* v. *Burns*, 45 N. H. 482; *Beadenbaugh* v. *Cooper*, 13 Rich. (S. C.) 42.

Thus, where a town paid certain sums for the aid of the family of a volunteer, in ignorance of the fact that he had been discharged, it was held entitled to recover the amount of the volunteer, it appearing that he knew that such aid was being furnished and gave the plaintiff no notice of his discharge. *Manchester* v. *Burns*, 45 N. H. 482. But if the money had been paid under an erroneous impression that the town was legally liable to pay it, and without any mistake of the facts, it could not have been recovered back (*Livermore* v. *Peru*, 55 Me. 469); nor if there had been any obligation on the part of the town to aid in the support of such family, upon the ground that they were paupers. The fact that the mistake might have been ascertained by proper diligence does not prevent a recovery; for, where a person sold goods under an agreement that from the price agreed upon the duties should be deducted, and in making out their statement they by mistake deducted $894.25 as duties, when in fact they only amounted to $699.40, it was held that the difference ($194.85) might be recovered as for money had and received, and that the fact that the mistake resulted from their carelessness, under the circumstances, did not preclude a recovery. *Renard* v. *Fiedler*, 3 Duer (N. Y.), 318. See, also, *Waite* v. *Leggett*, 8 Cow. 195, where it was held that excessive interest, paid by reason of a note being wrongly dated, might be recovered back even though the payor had the means of ascertaining what the true date was. So

it has been held that money paid for spurious stock may be recovered back, although inquiry made at the office of the company would have revealed its worthlessness. *Ketchum* v. *Bank of Commerce*, 19 N. Y. (5 Smith) 499.

So, where in the execution of a bill of sale, an error was made in the computation, by which the vendor paid $400 more than by the terms of the agreement upon which the bill was predicated, he was bound to pay, it was held that he was entitled to recover back that amount from the vendor. *Rosboro* v. *Peck*, 48 Barb. 92. So, where an administrator pays money to a person claiming to be a creditor of his intestate in ignorance of the fact that it has been already paid, and on final settlement is credited with the payment, an administrator *de bonis non* may recover the amount of the party to whom it was paid. *Walker* v. *Mock*, 39 Ala. 568. But in order to recover it back, it must have been paid under the supposition that it was due and owing to the defendant. That is, there must have been a supposition in the mind of the payor that there was some legal consideration therefor. *Sientes* v. *Odier*, 17 La. Ann. 153. And it must have been paid to him as principal, or if paid to him as the agent of another, an action will not lie against him, unless brought before he has paid it over to his principal. *Butler* v. *Livermore*, 52 Barb. 570.

In case the money has been paid over to the principal, the action must be brought against him, and in *all* cases, in order to uphold a recovery, a privity of contract must exist between the plaintiff and defendant. That is, there must be such a relation between them that the law will imply a promise to repay the money to the plaintiff. *Bloomer* v. *Denman*, 12 Ill. 240; *Dewey* v. *Board of Supervisors*, 62 N. Y. (17 Sick.) 294; *Hathaway* v. *Town of Cincinnatus*, 62 N. Y. (17 Sick) 434.

A bought an old safe, and afterward offered it to B, who refused to purchase it. It was then left with B for sale, B having permission to use it. B found between the outer casing and the lining a roll of bank bills belonging to some person unknown, whereupon A first demanded the money and then demanded the safe and its contents as they were when B received them. The safe was returned, but the money was retained by B. In assumpsit brought by A against B for the money found, it was held, that as against A, B was entitled to retain the money. *Durfee* v. *Jones*, 11 R. I. 588. And see *Tancil* v. *Seaton*, 28 Gratt. 601; *Bridges* v. *Hawkesworth*, 7 Eng. L. & Eq. 424. *Ante*, Vol. 2, 234.

§ 12. **Mistake of law.** The law is now well settled that where money has been voluntarily paid with a full knowledge of all the facts and circumstances under which it was demanded, it cannot be recov-

ered back upon the ground that the party paying it labored under a misapprehension of his legal rights and obligations. The maxim *ignorantia juris non excusat*, applies in such cases, and a party at his peril, must ascertain what his legal rights and liabilities are, and failing so to do, however he may have obtained his erroneous impressions, his payment is treated as voluntary, and he is remediless. *Elston* v. *Chicago*, 40 Ill. 514; *Brumagim* v. *Tillinghast*, 18 Cal. 265; *Evans* v. *Gale*, 17 N. H. 573; *Branham* v. *San Jose*, 24 Cal. 585; *Dickins* v. *Jones*, 6 Yerg. (Tenn.) 483; *Johnson* v. *McGinness*, 1 Oreg. 292; *Elliott* v. *Swartwout*, 10 Pet. (U. S.) 137.

The doctrine was well expressed by SUTHERLAND, J., in *Clark* v. *Dutcher*, 9 Cow. 674, in which he said "I consider the current or weight of authorities as clearly establishing the position, that when money is paid with a full knowledge of all the facts and circumstances upon which it was demanded, it cannot be recovered back upon the ground that the party supposed he was bound in law to pay it, when in truth he was not. He shall not be permitted to allege his ignorance of law, and it shall be considered a voluntary payment." The doctrine as announced by him has been generally accepted in this country, and has been generally applied in all cases where the question has since arisen. *Peterborough* v. *Lancaster*, 14 N. H. 383; *Eye* v. *Koontz*, 3 Penn. St. 109; *Morris* v. *Baltimore*, 5 Gill (Md.), 244; *Hubbard* v. *Martin*, 8 Yerg. (Tenn.) 498; *Brown* v. *Sawyer*, 1 Aik. (Vt.) 130; *Natcher* v. *Natcher*, 47 Penn. St. 496; *Ford* v. *Brownell*, 13 Minn. 184; *Filgo* v. *Penny*, 2 Murph. (N. C.) 182; *Lee* v. *Stuart*, 2 Leigh (Va.), 76.

But this is subject to the condition that the party receiving the money was guilty of no fraud or improper conduct inducing the payment (*Natcher* v. *Natcher*, 47 Penn. St. 496; *Eye* v. *Koontz*, 3 id. 109; *Silliman* v. *Wing*, 7 Hill, 159; *Robinson* v. *Charleston*, 2 Rich. [S. C.] 317); in which case, as will be seen, *post*, 488, § 14, the rule does not apply. So, too, where a mistake is of a mixed character, that is, partly of fact and partly of law, a recovery may be had. Thus, in *Jefts* v. *York*, 10 Cush. 392, money was advanced by the plaintiff to an agent for the use of his principal, for which a note was given by the agent for the principal, under a mutual mistake as to the capacity of the principal, to authorize the giving of the note, and upon which note in fact neither the principal nor agent were legally liable, it was held that the plaintiff was entitled to recover back the money from the agent, upon suit brought before he had paid the money over to his principal, notwithstanding the mistake was principally one of law. And, generally, when the money is *wrongfully* received by the defend-

ant, he is bound to refund it, although its payment was mainly but not entirely induced by a mistaken idea of the legal rights of the parties. *Brown* v. *Sawyer*, 1 Aik. (Vt.) 130; *Lodge* v. *Boone*, 3 H. & J. (Md.) 218. Where, however, as has previously been stated, the mistake is entirely one as to the law, money paid in pursuance of it cannot be recovered back. Thus, where a person purchases land at a foreclosure sale under a void mortgage, the money paid therefor cannot be recovered back, as the mistake is wholly one of law (*Branham* v. *San Jose*, 24 Cal. 585); nor, in the absence of fraud, can money paid for a deed of release be recovered back, although no title or interest passed by the deed. *Stewart* v. *Crosby*, 50 Me. 130. Neither can a recovery be had against a municipal corporation for money expended by the plaintiff in doing certain things required to be done by a void ordinance. *Mayor of Baltimore* v. *Lefferman*, 4 Gill (Md.), 425. Nor can money paid under a void judgment be recovered back unless the judgment has been set aside (*Job* v. *Collier*, 11 Ohio, 422; *Homer* v. *Fish*, 1 Pick. 439; *Morton* v. *Chandler*, 7 Me. 45); nor for money paid for the costs of a criminal prosecution under a supposition that he must do so as a condition precedent to an appeal (*Ford* v. *Brownell*, 13 Minn. 184); and, generally, when the money is paid without fraud or duress on the part of the person receiving it, but purely under a misapprehension by the payor as to his legal rights and liabilities, he cannot recover it back. *Bean* v. *Jones*, 8 N. H. 149; *Livermore* v. *Peru*, 55 Me. 469; *Brown* v. *Rich*, 40 Barb. 28; *Chapman* v. *Spiller*, 14 Q. B. 621; *Evans* v. *Gale*, 17 N. H. 573; *Cahaba* v. *Burnett*, 34 Ala. 400; *Bond* v *Coats*, 16 Ind. 202.

§ 13. **Ignorance of foreign law.** Money paid under a mistake as to the laws of a foreign country may be recovered back, as the courts treat such mistakes as mistakes of fact (*Haven* v. *Foster*, 9 Pick. 112; *Norton* v. *Marden*, 15 Me. 45); and the same rule prevails in reference to the statutes of another State (*Bank of Chillicothe* v. *Dodge*, 8 Barb. 233); or in reference to any private statute of which the courts will not take judicial notice without proof, as of the charter of a private corporation (*Drake* v. *Flewellen*, 33 Ala. 106); or private statutes of any kind of the provisions of which the public is not presumed to know. *Bowie* v. *Kansas City*, 51 Mo. 454; *Covington Drawbridge Co.* v. *Shepherd*, 20 How. (U. S.) 227.

§ 14. **Payment under duress or compulsion, extortion, etc.** Involuntary payments, made under compulsions of legal process, or duress of goods or of the person, *which the person receiving has no right to retain*, may be recovered back. *Beckwith* v. *Frisbie*, 32 Vt. 559; *Harmony* v. *Binham*, 12 N. Y. (2 Kern.) 99; *Adams* v.

Reeves, 68 N. C. 134; 12 Am. Rep. 627; *Nickodemus* v. *East Saginaw*, 25 Mich. 456; *Schommer* v. *Farwell*, 56 Ill. 542; *McKee* v. *Campbell*, 27 Mich. 497; *Hendy* v. *Soule*, *Deady* (C. C.), 400; *Chandler* v. *Sanger*, 114 Mass. 364; 19 Am. Rep. 367. But, however payment of a *legal* claim may be attained, or one to which the payee is justly entitled, whether by compulsion of legal process, threats or menaces of imprisonment, or of personal violence, or by duress of goods, it cannot be recovered back. *Kohler* v. *Wells*, 26 Cal. 606; *Dickerman* v. *Lord*, 21 Iowa, 338; *Bragdon* v. *Somerby*, 55 Me. 92. In order to entitle the party paying it to regain the amount by suit, there must have been not only an enforced payment by duress of goods or of the person, or some other undue advantage taken of the payor, *but also the party to whom the money was paid must have had no legal or just claim against the payor therefor.* The rule is that where money is obtained from one by duress, extortion or oppression, or by taking an undue advantage of his situation, for the payment of which the payee has no legal or just claim against him, it may be recovered back. *Goddard* v. *Bulow*, 1 N. & McC. (S. C.) 45; *Mathers* v. *Pearson*, 13 S. & R. (Penn.) 258; *Bliss* v. *Thompson*, 4 Mass. 488; *Chase* v *Dwinal*, 7 Me. 134; *Clinton* v. *Strong*, 9 Johns. 370; *Quinnett* v. *Washington*, 10 Mo. 53. The plaintiff must show not only the duress, but also that the demand was illegal (*Mariposa Co.* v. *Bowman*, Deady (C. C.), 228; *Lafayette, etc., R. R. Co.* v. *Pattison*, 41 Ind. 312; *State* v. *Sluder*, 70 N. C. 56; *Chandler* v. *Sanger*, 114 Mass. 364; 19 Am. Rep. 367); and if the claim was legal or just it cannot be recovered back (*Dickerman* v. *Lord*, 21 Iowa, 338; *Miles* v. *McLellan*, 2 N. & McC. [S. C.] 133; *First Nat. Bank* v. *Watkins*, 21 Mich. 483; *Adams* v. *Reeves*, 68 N. C. 134; 12 Am. Rep. 627; *Nickodemus* v. *East Saginaw*, 25 Mich. 456); and the same rule has been applied when money is obtained from a person who is intoxicated. *Hayes* v. *Huffstater*, 65 Barb. 530. As to the precise character of the threats that must be used in order to constitute duress of the person, or of goods, so as to make the payment involuntary, no fixed rule can be given, but each case must measurably stand by itself, upon its own peculiar facts and circumstances. But it would seem, that in order to constitute duress of the person from threats and menaces, they must be of such serious bodily harm as would overcome the will of a person of ordinary firmness (*Harmon* v. *Harmon*, 61 Me. 227; 14 Am. Rep. 556; *Bosley* v. *Shanner*, 26 Ark. 280; *State* v. *Sluder*, 70 N. C. 55), and it must also appear that the payor was in fact influenced thereby, and as to whether he was or not, must be inferred from the

character of the threats and the circumstances attending them. *Feller* v. *Green*, 26 Mich. 70. In order to constitute a duress of the person by threats of imprisonment, or by actual imprisonment or restraint, it must appear that a process to that end had actually been issued, or that there was no reasonable doubt that it would be (*Harmon* v. *Harmon*, 61 Me. 227; 14 Am. Rep. 556; *State* v. *Slader*, 70 N. C. 55), and that the money extorted under such threats or arrest was not legally or justly due from the payor. *Diller* v. *Johnson*, 37 Tex. 47; *Steinbacker* v. *Wilson*, Leg. Gaz. Rep. (Penn.) 76; *Knapp* v. *Hyde*, 60 Barb. 80.

Mere threats of personal violence, or of prosecution, are not enough, there must be a reasonable ground for creating an apprehension that the threats will be carried into execution, in the mind of a man of ordinary firmness and courage, and must operate upon him directly, so as to overcome his will. Thus, in *Harmon* v. *Harmon*, 61 Me. 229; 14 Am. Rep. 566, a man who was not known to be addicted to the use of profane language, with oaths, demanded a portion of the money received by the plaintiff, under an insurance policy upon a mill that had recently been burned, of which the parties were co-tenants, and threatened in the presence of the plaintiff's wife that, unless the same was paid to him, he would prosecute him for setting the mill on fire, and that he would have him in jail before night, and the plaintiff, *not in consequence of any fear of injury to himself*, but fearing ill consequences to his wife's health, paid the money, it was held not to be a payment under duress, within the rule. In a North Carolina case (*State* v. *Sluder*, 70 N. C. 55), a person who was acting as the guardian of some wards, and who, as such guardian, had a claim against a person, refused to take Confederate money from him in payment of such claim, when the person tendering it approached him and raising his hand, said "I intend to have my note; Confederate money is legal tender," and the guardian having heard that a judge had recently decided that it was an indictable offense to refuse to take Confederate money, received the money and was credited with it by the probate judge, the court held that he was, notwithstanding these facts, liable for the amount of the note, upon his bond, as there was no such duress as made the act involuntary. Where, however, actual violence is used, or threats of violence of such a character as has previously been spoken of, or where a person is actually restrained of his liberty even under a void process, a payment made, which otherwise would not have been made, is a payment under duress. *Durr* v. *Howard*, 6 Ark. 461; *Maxwell* v. *Griswold*, 10 How. (U. S.) 242; *Beckwith* v. *Frisbie*, 32 Vt. 559; *White* v. *Heylman*, 34 Penn. St. 142. Where a county treasurer represented

to the plaintiff's clerk, after he had commenced proceedings to enjoin the collection of a tax, that the supreme court had decided that the tax was legal (which was untrue), and that, unless the plaintiff paid it, his property would be sold therefor, and the clerk, the plaintiff being absent, paid it, it was held to be a payment under duress, and recoverable back without demand, from the treasurer. *Greenabaum* v. *King*, 4 Kans. 332. As to involuntary payments, see *Quinnett* v. *Washington*, 10 Mo. 53; *Satterdale* v. *Kaiser*, 15 La. Ann. 596; *Hubbard* v. *Brainard*, 35 Conn. 563; *First National Bank* v. *Watkins*, 21 Mich. 483; *Lauman* v. *Des Moines County*, 29 Iowa, 310.

A payment of a tax to a collector or other officer having authority to collect the same is compulsory (*County Commissioners* v. *Parker*, 7 Minn. 267; *Hubbard* v. *Brainard*, 35 Conn. 563); and, generally, it may be said that, when money not legally due is exacted from one by another, either under threats of violence or of personal restraint, or by taking an undue advantage of him by the detention of his goods, or by the compulsion of legal process, or by one who by law is clothed with power to collect it if it were in fact legally due, the payment is involuntary. *Clinton* v. *Strong*, 9 Johns. 370; *Hubbard* v. *Brainard*, 35 Conn. 563; *Severance* v. *Kimball*, 8 N. H. 386.

Duress of goods consists in the wrongful withholding of personal property from the custody or possession of the payor, unless a certain sum, not legally or justly due, is paid for their release; and in such cases, money paid for their release is treated as having been extorted from the payor, and he is entitled to recover the amount paid in excess of any claim that he was legally bound to pay thereon; as where a greater sum than he has contracted to carry goods for is charged by a carrier, before he will deliver them up (*Tutt* v. *Ide*, 3 Blatchf. [C. C.] 249; *Lafayette, etc., R. R. Co.* v. *Pattison*, 41 Ind. 312); or where goods are taken by a public officer in virtue of his office, and withheld for duties, taxes or other purpose, until a certain amount is paid thereon, the owner may pay the amount claimed, in order to release the goods, and as to the sum in excess of what he was legally liable to pay, he may bring an action and recover for money had and received. *Schlesinger* v. *United States*, 1 Ct. of Cl. 116. So, where perishable goods, or goods requiring special care and attention, are taken upon a writ of attachment, and the creditor in the writ refuses to deliver them up unless a larger sum than is actually due him is paid, the owner of the goods may recover the excess over what was actually due. *Spaids* v. *Barrett*, 57 Ill. 289; 11 Am. Rep. 10.

When taxes are paid on the demand of an officer having authority to collect them by distraint or otherwise, there is sufficient duress to make

the payment involuntary, and there can be no question but that, when a tax is assessed and the law makes provision for an enforced collection of it, its payment to the officer designated to receive it, comes under the head of an involuntary payment, whether a warrant has in fact been issued for its collection or not. *Hendy* v. *Soule*, Deady (C. C.), 400.

In such cases the party should protest against the payment, and his payment should be made under protest, but if the officer has a legal process for their collection, and is clothed with apparent authority to collect them, a recovery may be had *of the amount actually paid* without interest, although no protest was made. *McKee* v. *Campbell*, 27 Mich. 497; *Atwell* v. *Zeluff*, 26 id. 118. Thus, where a tax collector sold certain stock belonging to the plaintiff under a tax warrant to satisfy an illegal tax, and the plaintiff, knowing the facts, procured a person to bid it off for him, and then brought an action to recover back the amount paid, it was held that the payment was not voluntary, and that the sum paid might be recovered back. *Bailey* v. *Goshen*, 32 Conn. 546.

It is of no importance that the person paying the money knows that the claim is illegal, unjust, or extortionate, if his goods are detained and the party refuses to deliver them up until the claim is paid, its payment is not voluntary. Thus, in *Cobb* v. *Charter*, 32 Conn. 358, the defendant had possession of a chest of tools belonging to the plaintiff, which he refused to deliver until a bill that he had against the plaintiff's son for board was paid. The plaintiff finally paid the bill, and, in an action to recover back the amount, the court held that the payment was involuntary, and that he was entitled to recover the amount paid by him, with interest. So, where money, illegally exacted, was paid to release a vessel that had been seized, it was held an involuntary payment. *Clinton* v. *Strong*, 9 Johns. 370.

The question as to whether a duress of goods existed or not depends upon the fact whether the party had a right to demand them as his property, and had done all that he was legally bound to do to entitle him to their delivery. If he has, in fact, no right to the custody of the goods until he has performed certain conditions precedent, it is not duress for the person holding them to refuse to deliver them until such conditions are complied with, but, if he requires more to be done than the party is legally bound to do, the excess comes under the head of duress. *Block* v. *United States*, 8 Ct. of Cl. 461.

§ 15. **Payment of illegal fees.** Fees illegally exacted as a condition of releasing a person's person or property from arrest or seizure (*Clinton* v. *Strong*, 9 Johns. 370); or for the exercise of any privilege

to which the party paying it is entitled without the payment of such fee, or for the payment of a less sum, are treated as involuntary payments (*Robinson* v. *Ezzell*, 72 N. C. 231; *Ogden* v. *Maxwell*, 3 Blatchf. C. C. 319); as where fees are illegally exacted for the release of a vessel wrongfully seized (*Clinton* v. *Strong*, 9 Johns. 370); or for permits to land passengers from a vessel under a law having no validity (*Ogden* v. *Maxwell*, 3 Blatchf. C. C. 319); and, generally, when a sheriff or other officer who is authorized to exact certain fees from an individual for particular services, or on any account, exacts or takes from him more than he is authorized by law to take, and the party pays them to him, not knowing that they are excessive, or to secure a right, he can recover back the excess (*Moulton* v. *Bennett*, 18 Wend. 586; *Britton* v. *Frink*, 3 How. [N. Y.] 102); or where fees are exacted as a condition for the exercise of a right to which the party is entitled, without fee (*Townshend* v. *Dyckman*, 2 E. D. S. 224; *Frye* v. *Lockwood*, 4 Cow. [N. Y.] 454; *Ripley* v. *Gelston*, 9 Johns. [N. Y.] 201); but, if the fees are paid with a knowledge of the fact that they are excessive, or not legally chargeable, they cannot be recovered back. Thus, where a suit, in which property was attached, was settled before entry, and a percentage was charged as a part of the costs, against which the plaintiff protested, but finally paid it, it was held that the payment was voluntary, and that the amount paid in excess of what was legally due could not be recovered back. *Rawson* v. *Porter*, 9 Me. 119.

§ 16. **Payments under protest.** A person who, without the compulsion of legal process, or duress of goods or of the person, yields to the assertion of an invalid or unjust claim by paying it, cannot by a mere protest, whether in writing or by parol, change its character from a voluntary into an involuntary payment. The payment overcomes and nullifies the protest. As where a person, knowing that an ordinance of a city requiring the payment of a certain sum for a license, takes out a license and pays for it under protest (*Cook* v. *Boston*, 9 Allen, 393; *Allentown* v. *Saegar*, 20 Penn. St. 421; *Mays* v. *Cincinnati*, 1 Ohio St. 274; *contra*, see *Leonard* v. *Canton*, 35 Miss. 189); or where a person, with a knowledge of the facts, pays more costs in an action than are legally chargeable (*Rawson* v. *Porter*, 9 Me. 119); or more than is due, or a claim to which there is no validity. *Benson* v. *Monroe*, 7 Cush. 125. Thus, where a person knowing that certain lands were not subject to taxation, paid the taxes assessed thereon under protest, to prevent the issue of tax deeds, it was held that the payment was voluntary. *Phillips* v. *Jefferson County*, 5 Kans. 412. So, where the register of lands refused to record the plaintiff's deed until he had secured a certificate from the auditor that the taxes thereon had been

paid, and he paid the taxes, at the same time protesting that he paid them to procure the registration of his deed, it was held a voluntary payment. *Smith* v. *Schroeder*, 15 Minn. 35. So, a tax was assessed on land under a statute afterward decided to be unconstitutional, but prior to such decision the owner paid the tax, under protest, to prevent a threatened sale; and it was held that the payment was voluntary, though made under protest, and that the money could not be recovered back. *Detroit* v. *Martin*, 34 Mich. 170; S. C., 22 Am. Rep. 512. But where an illegal tax is paid, under protest, to one having authority to enforce its collection, it is an involuntary payment and may be recovered back. *Lauman* v. *Des Moines Co.*, 29 Iowa, 310; *First Nat. Bank* v. *Watkins*, 21 Mich. 483. And see *Jersey City* v. *Riker*, 9 Vroom (N. J.), 225; S. C., 20 Am. Rep. 386; *Rogers* v. *Greenbush*, 58 Me. 390; S. C., 4 Am. Rep. 292; *Grim* v. *School District*, 57 Penn. St. 434.

The rule is that, when a person pays an illegal or unjust demand, without an immediate and urgent necessity therefor, with a full knowledge of all the facts, or, unless to release his person or property from detention, or to prevent an immediate seizure of his person or property, the payment is voluntary, notwithstanding it is made under protest. *Kansas, etc., R. R. Co.* v. *Wyandotte Co.*, 16 Kans. 587. Thus, in the last-named case, all the steps for determining the amount of a tax upon personal property had been taken, the tax roll was complete, the taxes were due, and the roll was in the treasurer's hands, and it was the treasurer's duty at a specified date (which had not arrived at the time when the plaintiff paid the tax) to issue a warrant to the sheriff within sixty days thereafter to levy upon and sell sufficient personal property to pay such taxes. It was held that a payment of such tax to the treasurer under a protest that it was paid solely to prevent the issue of process to sell the plaintiff's property, did not change the character of the payment from a voluntary to an involuntary one. It will be seen that a distinction was drawn in this case between a payment made to one having no *immediate* authority, to enforce payment, and a payment made to one who has such authority, and this is the distinction running through all the cases. A mere apprehension of legal proceedings is not sufficient to make a payment compulsory. There must exist *an immediate power or authority* to institute them. *Ligonier* v. *Ackerman*, 46 Md. 552.

The object of a protest is to take from the payment its voluntary character, and thus preserve to the party a right of action to recover it back. It is only available in cases of coercion or duress, or where undue advantage is taken of the party's situation, and only serves as

evidence that the payment was not voluntary, and in order to be efficacious there must be actual coercion, duress or fraud, presently existing, or the payment will be voluntary in spite of the protest. *Flower* v. *Lance*, 59 N. Y. (14 Sick.) 603; *Marietta* v. *Slocomb*, 6 Ohio St. 471; *McMillan* v. *Richards*, 9 Cal. 365; *Forrest* v. *New York*, 13 Abb. Pr. (N. Y.) 350; *Fleetwood* v. *City of New York*, 2 Sandf. (N. Y.) 475; *Briggs* v. *Boyd*, 56 N. Y. (11 Sick.) 289; *Emmons* v. *Scudder*, 115 Mass. 367.

As to whether a person paying money illegally demanded by a public officer, under coercion, must, in order to preserve his right to recover it back, pay the same under protest, is not clearly settled. In California the rule is that, where the person demanding the money has notice of the illegality of the demand, a protest is not necessary, but that where he has no such notice or knowledge, a protest is a condition precedent to a right of recovering it back. *Meek* v. *McClure*, 49 Cal. 624.

But in Michigan it is held that a protest under such circumstances is not necessary to a recovery of the sum paid, but that in the absence of a protest, no interest is recoverable. *Atwell* v. *Zeluff*, 26 Mich. 118; *McKee* v. *Campbell*, 27 id. 497.

As to personal or private claims, it is held that, if a person knowing that he has no legal claim against another, sues out a legal process against him and seizes his property thereon, and the defendant acting under the representations of the plaintiff, and being unable at the time to prove the falsity of the claim, pays the amount without protest, he may recover it back. *Nickodemus* v. *East Saginaw*, 25 Mich. 456; *Adams* v. *Reeves*, 68 N. C. 134; 12 Am. Rep. 627; *Schommer* v. *Farwell*, 56 Ill. 542; *Bennett* v. *Healey*, 6 Minn. 240; *Curtis* v. *Fiedler*, 2 Black (U. S.), 461.

§ 17. **Payments obtained by fraud, deceit, etc.** Money that has been paid to another by reason of his fraudulent representations or conduct, or of others by his procurement, may always be recovered back upon the principle that fraud vitiates all contracts. *Hinsdill* v. *White*, 34 Vt. 558; *Catts* v. *Phalen*, 2 How. (U. S.) 376; *Magoffin* v. *Muldrow*, 12 Mo. 512; *Gibson* v. *Stevens*, 3 McLean (C. C.), 551; *Reynolds* v. *Rochester*, 4 Ind. 43. Thus, it has been held that money paid to one as a prize drawn in a lottery, by fraudulent means, may be recovered back (*Catts* v. *Phalen*, 2 How. [U. S.] 376); so, where a person procures money to be paid to him by false representations that it belongs to another (*McDonald* v. *Todd*, 1 Grant's Cas. [Penn.] 17); or where a person borrows money for a third person representing the security to be good when he knows that it is not (*Frevall* v. *Fitch*, 5

Whart. [Penn.] 325); so, where one misrepresents the quality of the security given for a loan (*Vantine* v. *Wood*, 13 Penn. St. 270; *Bank of Montgomery* v. *Parrish*, 20 Ala. 433); so when a person has procured money to be paid to him for a loss under an insurance policy, and it subsequently transpires that the loss was fraudulent (*McConnel* v. *Del. Mut. Ins. Co.*, 18 Ill. 228; *Dodge Co. Mut. Ins. Co.* v. *Sawyer*, 37 Wis. 503); and, generally, in all cases where one has induced another to part with his money by fraudulent means of any kind, he is liable to refund the same to a person paying it to him, in an action for money had and received (*Hinsdill* v. *White*, 34 Vt. 558; *Gorman* v. *Carroll*, 7 Allen, 199; *Pheteplace* v. *Eastman*, 26 Iowa, 446; *Lebanon* v. *Heath*, 47 N. H. 353); provided the plaintiff first offers to put the defendant in *statu quo*. *Gilbert* v. *Ross*, 1 Strobh. (S. C.) 287; *Hogan* v. *Weyer*, 5 Hill, 389. But the action must be brought by the person defrauded (*Magwire* v. *Hall*, 27 Mo. 146); or, in these States where by statute the assignee of a chose in action may sue for the same, by his assignee.

§ 18. **Payments upon forged instruments.** A person who, *bona fide*, and in ignorance of the fact, pays money upon a forged instrument of any kind, may recover it back of the person to whom it was paid (*Wilson* v. *Alexander*, 4 Ill. 392; *Terry* v. *Bissell*, 26 Conn. 23; *Little* v. *Derby*, 7 Mich. 325; *Rick* v. *Kelly*, 30 Penn. St. 527; *Canal Bank* v. *Bank of Albany*, 1 Hill, 287; *Goddard* v. *Merchants' Bank*, 4 N. Y. [4 Comst.] 147); except in cases where the person paying the money is chargeable with such negligence as estops a recovery, as when the drawee of a bill of exchange, draft or check, pays it to a *bona fide* holder for value (*Bank of St. Albans* v. *Farmers', etc., Bank*, 10 Vt. 141; *Goddard* v. *Merchants' Bank*, 4 N. Y. [4 Comst.] 147; *Van Duzer* v. *Howe*, 21 N. Y. [7 Smith] 531; *Bank of U. S.* v. *Bank of Georgia*, 10 Wheat. [U. S.] 333; *Stout* v. *Benoist*, 39 Mo. 277; *Dodge* v. *Natl. Exchange Bank*, 20 Ohio St. 234; 5 Am. Rep. 648; *Cooper* v. *Le Blanc*, 2 Strange, 1051); upon the ground that a drawee of a bill, draft or check, is presumed to be familiar with the signature of the drawer. Consequently, the rule does not apply when an instrument has been *altered;* as the signature being genuine, he is justified in presuming that the sum for which it is drawn is correct. *Goddard* v. *Merchants' Bank*, 4 N. Y. (4 Comst.) 147; *Worrall* v. *Gheen*, 39 Penn. St. 388; *Bruce* v. *Bruce*, 5 Taunt. 495; *Young* v. *Grote*, 4 Bing. 253; *Hall* v. *Fuller*, 5 B. & C. 750.

In all other instances a person paying out money upon a forged, counterfeited or altered instrument may recover it back unless he has been guilty of such *laches* as estop him. Thus, where a person paid

money for a promissory note with a forged indorsement, it was held that he might recover back the amount with interest (*Terry* v. *Bissell*, 26 Conn. 23; *Roth* v. *Crissy*, 30 Penn. St. 145); so, where an administrator paid out money upon a note purporting to have been made by his intestate, but which in fact was forged, it was held that he might recover it back, as the same rule could not be applied in such a case, as would have applied if the note had been paid by the intestate himself in his life-time. *Wilson* v. *Alexander*, 4 Ill. 392. So, where a person has received forged or counterfeited bank notes or coins, in payment of a debt or for property sold, he may recover the amount of the payor in an action for money had and received (*Pindall* v. *North Western Bank*, 7 Leigh [Va.], 617; *Hargrave* v. *Dusenbury*, 2 Hawks. [N. C.] 326; *Chalmers* v. *Harris*, 22 Tex. 265; *Young* v. *Adams*, 6 Mass. 182); but he must exercise reasonable diligence in the matter. One keeping a counterfeit note six months, *knowing* it to be so, was thereby held disentitled to recover the amount of one who innocently passed it to him (*Raymond* v. *Baar*, 13 S. & R. [Penn.] 318; *Union National Bank* v. *Baldenwick*, 45 Ill. 375); and the same rules apply to cases where depreciated money has been received at its par value, in ignorance of the depreciation. *Bank of Missouri* v. *Benoist*, 10 Mo. 519.

§ 19. **Payments on illegal contracts.** When money is voluntarily paid under an illegal contract, both parties being in *pari delicto*, it cannot be recovered back. *Spaulding* v. *Bank of Muskingum*, 12 Ohio, 544; *Jacobs* v. *Stokes*, 12 Mich. 381; *Barnard* v. *Crane*, 1 Tyler (Vt.), 457; *Perkins* v. *Savage*, 15 Wend. 412; *Wolfe* v. *Marshal*, 52 Mo. 167; *Wabaunsee Co.* v. *Walker*, 8 Kans. 431; *Merwin* v. *Huntington*, 2 Conn. 209; *Howson* v. *Hancock*, 8 T. R. 575; *Tomkins* v. *Bernet*, 1 Salk. 22; *Norman* v. *Cole*, 3 Esp. 253; *Commr's of Catawba* v. *Setzer*, 70 N. C. 426. But it is said that where money is contributed for an unlawful purpose, it may be recovered back at any time before it has actually been used for such purpose. *Taylor* v. *Bowers*, L. R., 1 Q. B. Div. 291; 16 Eng. Rep. 348; *Bailey* v. *O'Mahony*, 33 N. Y. Superior Ct. 239. See, also, similar in principle, *White* v. *Franklin Bank*, 22 Pick. 181; *Spring* v. *Coffin*, 10 Mass. 31. That is, where a contract is simply void, but not criminal, money paid in pursuance of it may be recovered back so long as it remains executory. *Brown* v. *Timmany*, 20 Ohio, 86; *Pepper* v. *Haight*, 20 Barb. 429; *Skinner* v. *Henderson*, 10 Mo. 205; *Woodworth* v. *Bennett*, 43 N. Y. (4 Hand) 273; 3 Am. Rep. 706; *Bailey* v. *Belmont*, 10 Abb. Pr. (N. S. N. Y.) 270. By "*in pari delicto*" is meant when the parties are in equal fault. That is, when they are on an equal footing as to the na-

ture and character of the enterprise in which the money is to be invested, in which case the courts, either of law or equity, will give no relief; but when the party paying the money is not aware of the illegal character of the transaction, or when the money is extorted from him by duress either of the person or goods, he may recover it back (*Mobile Branch Bank* v. *Scott*, 7 Ala. 107; *Webb* v. *Fulchire*, 3 Ired. [N. C.] 485; *Boutelle* v. *Melendy*, 19 N. H. 196; *Wyman* v. *Fiske*, 3 Allen, 238; *Carey* v. *Prentice*, 1 Root [Conn.], 91; *Concord* v. *Delaney*, 58 Me. 309); and the same rule applies when the money is paid under a contract that is void upon grounds of public policy. *Liness* v. *Hesing*, 44 Ill. 113; *Tyler* v. *Smith*, 18 B. Monr. (Ky.) 793. Thus, it has been held, that money paid to stop a criminal prosecution for a felony (*Barclay* v. *Breckenridge*, 4 Metc. [Ky.] 374); or for losses in a stock jobbing transaction (*Wyman* v. *Fiske*, 3 Allen, 238); or to procure a person to be nominated for an office (*Liness* v. *Hesing*, 44 Ill. 113); and, generally, for any purpose that is prohibited by law or that is against public policy, cannot be recovered back. *Comm'rs of Catawba* v. *Setzer*, 70 N. C. 426; *Lusk* v. *Patton*, id. 701. But, where the act is only illegal as to the party receiving the money, a different rule prevails, as where by statute it is made unlawful to sell intoxicating liquors or to take more than a certain rate of interest upon a loan, the purchaser of the liquors (*Adams* v. *Goodnow*, 101 Mass. 81; *Laport* v. *Bacon*, 48 Vt. 176); or the payor of the interest may recover back the money paid (*Cross* v. *Bell*, 34 N. H. 83; *Wheaton* v. *Hibbard*, 20 Johns. 290; *Boardman* v. *Roe*, 13 Mass. 105.

So, where a payment is prohibited by law, the amount paid may be recovered back (*Association* v. *Ellslin*, 6 Phila. [Penn.] 6; *Curtis* v. *Leavitt*, 15 N. Y. [1 Smith] 9); so, where money is paid upon a void consideration (*Spring* v. *Coffin*, 10 Mass. 31); or where a man is *cheated* out of his money, although in playing a game forbidden by law. *Webb* v. *Fulchire*, 3 Ired. (N. C.) 485. So, where money is paid upon an invalid contract, that cannot be enforced by law, as where it is void under the statute of frauds, it may be recovered back if the person to whom it was paid refuses to perform specifically (*Marsh* v. *Wyckoff*, 10 Bosw. [N. Y.] 202; *Reynolds* v. *Harris*, 9 Cal. 338; *Phillips* v. *Hudson*, 31 N. J. Law, 143); but not if the party to whom it is paid offers to perform (*Beaman* v. *Buck*, 17 Miss. 209; *Congdon* v. *Perry*, 13 Gray, 3; *Collier* v. *Coates*, 17 Barb. 471; *Bennett* v. *Phelps*, 12 Minn. 327.

§ 20. **Payment of illegal interest.** When the law fixes the legal rate of interest, and prohibits the taking of a greater rate, all interest charged and paid in excess of the legal rate may be recovered back in

an action for money had and received. *Wheaton* v. *Hibbard*, 20 Johns. 290; *Thomas* v. *Shoemaker*, 6 W. & S. (Penn.) 179; *Berry* v. *Makepeace*, 3 Ind. 154; *Cross* v. *Bell*, 34 N. H. 83; *Boardman* v. *Roe*, 13 Mass. 105; *Scott* v. *Leary*, 34 Md. 389; *State Bank* v. *Ensminger*, 7 Blackf. (Ind.) 105. But if the contract does not provide for the payment of interest at all, and the party, supposing that it was upon interest, paid interest, it was held that it could not be recovered back (*Buel* v. *Boughton*, 2 Denio, 91); so, in Minnesota, in *Nutting* v. *McCutcheon*, 5 Minn. 382, it was held that where the parties verbally agreed upon the payment of interest at the current rate of seven per cent, but payments were in fact made at a higher rate, that the excess could not be recovered back. But in Vermont, in *Stevens* v. *Fisher*, 23 Vt. 272, it was held that where a greater rate of interest than that provided by law was taken, it was immaterial to the right of recovery, whether the excessive rate was paid in pursuance of an usurious agreement made at the time when the contract was entered into or not, but in that State the statute provides that if any greater rate of interest than six per cent shall be taken for the use of money, the excess may be recovered back. There is an apparent inconsistency in permitting a person to recover back usurious interest paid upon a contract, unless the statute provides therefor, as the payment is certainly voluntary, and the party by resisting the claim could prevent its recovery; and although it may be true that it is more economical to pay the excessive rate than to litigate the question, yet, in all other instances, except where there is duress, coercion or fraud, a party is bound to stand upon and defend his rights at his peril, and there would seem to be no good reason why the same rule should not prevail as to usurious interest.

§ 21. **Payments without consideration.** Of course, where money is *given* to a person as a voluntary gift, it cannot be recovered back; but where it is paid to a person under a contract by which the person paying expects to receive something of value, and it proves valueless, or where it is paid to secure a certain right or privilege, and it proves utterly inoperative for such purpose, it may be recovered back; as where a person pays money for an insurance that never attaches (*Hazard* v. *Franklin Ins. Co.*, 7 R. I. 429); or where a slave, already free, pays money to his master to secure his freedom (*Currance* v. *McQueen*, 2 Paine's C. C. 109); or money is paid to a municipal corporation for a license which it had no power to grant. *Leonard* v. *Canton*, 35 Miss. 189. But in these cases the recovery proceeds upon the ground that there was a *failure* of consideration, and not that the money was paid without consideration. As in that case, in the absence of duress, coercion

or fraud, the payment would be voluntary and gratuitous. *Speise* v. *McCoy*, 6 W. & S. (Penn.) 485; *Gibbs* v. *Swift*, 12 Cush. 393. See § 22 for a fuller treatment of the subject.

§ 22. **Payment upon a consideration that has failed.** Money that is paid by one to another upon a consideration that has entirely failed, as, where it was paid in consideration of something which was agreed to be done, but which was never performed (*King* v. *Hutchins*, 28 N. H. 561; *Congdon* v. *Perry*, 13 Gray, 3; *Beaman* v. *Buck*, 17 Miss. 209; *Phillips* v. *Hudson*, 31 N. J. Law, 143; *Richard* v. *Allen*, 17 Me. 296; *Hickock* v. *Hoyt*, 33 Conn. 553; *White* v. *Merrell*, 32 Ill. 511; *Leach* v. *Tilton*, 40 N. H. 473); or for property the title to which has failed in all those cases where the law implies a warranty of title, either because the vendor had no title, or because he fails to do that which he was bound to do to perfect it. *Phillips* v. *Hudson*, 31 N. J. Law, 143; *Pennington* v. *Clifton*, 10 Ind. 172; *Murray* v. *Carret*, 3 Call. (Va.) 373; *Lebanon* v. *Heath*, 47 N. H. 353. Thus where money is paid for efforts to be used in procuring a pardon of a criminal and no efforts are ever made (*Adams Express Co.* v. *Reno*, 48 Mo. 264); so where a town paid money to a substitute broker for a substitute who proved to be a deserter, and was dropped from the credit of the town (*Lebanon* v. *Heath*, 47 N. H. 353); so, where a person purchased a draft, and having lost it, the drawer refused to give a duplicate (*Murray* v. *Carret*, 3 Call. [Va.] 373); or where he has paid money for property that proves utterly worthless, where there is a warranty express or implied, or that proves not to be as warranted, or where it proves to be different from what it was represented to be by the seller, the purchaser may, by tendering back the property, recover the sum paid, in an action for money had and received, if he prefers to do that, instead of proceeding for damages for a breach of warranty, or for deceit. *Way* v. *Cutting*, 17 N. H. 450; *Dutricht* v. *Melchor*, 1 Dall. (Penn.) 428; *Wilson* v. *Jordon*, 3 S. & P. (Ala.) 92; *Bradford* v. *Manly*, 13 Mass. 139; *Conner* v. *Henderson*, 15 id. 319. So where a person draws an order in favor of one upon another, but, before the order is presented, directs the person upon whom it is drawn not to pay it, the drawee may recover the amount as for money had and received of the drawer (*Child* v. *Moore*, 6 N. H. 33); so where money is paid for property which the payee refuses to deliver (*Harrison* v. *Chilton*, 5 Yerg. [Tenn.] 293; *Hancock* v. *Tanner*, 4 S. & P. [Ala.] 262; *Davis* v. *Marston*, 5 Mass. 199); so, where money is paid for certain land which is deeded, and no land exists of the description contained in the deed (*Dutricht* v. *Melchor*, 1 Dall. [Penn.] 428); so, when money is paid as advance rent of premises, which the

owner conveys to a third person before the lease is made (*Weeks* v. *Hunt*, 13 Vt. 144); so, where a person pays money under a verbal agreement for land with a house on it, and before the land is conveyed the house is burned, he may recover back the money paid (*Thompson* v. *Gould*, 20 Pick. 134); and, generally, in all cases where the consideration for which money was paid fails through no fault of the payor, he may recover it back. *Pindall* v. *North Western Bank*, 7 Leigh (Va.), 617; *Barnes* v. *Baylies*, 18 Vt. 430; *Earle* v. *De Witt*, 6 Allen, 520; *Steele* v. *Hobbs*, 16 Ill. 59; *Griggs* v. *Morgan*, 9 Allen, 37; *Strong* v. *Bliss*, 6 Metc. 393; *Lyon* v. *Annable*, 4 Conn. 350; *Putnam* v. *Westcott*, 19 Johns. 73; *Smith* v. *McCluskey*, 45 Barb. 610. But in order to recover, the plaintiff must show that he paid money, or that which was accepted as, or has been converted into money (*Van Ostrand* v. *Reed*, 1 Wend. 424); and the failure of consideration must be total. *Freeman* v. *Galbraith*, Wright (Ohio), 591; *Charlton* v. *Lay*, 5 Humph. (Tenn.) 496; *Miner* v. *Bradley*, 22 Pick. 457; *Begbie* v. *Phosphate Sewage Co.*, L. R., 10 Q. B. 491; 14 Eng. Rep. 296.

§ 23. **Rescinded or abandoned contract.** In all cases where money has been paid to a person in pursuance of an executory contract, and he has the power to and does rescind the same, or even where he is legally bound to perform, but refuses to do so, the payor may recover back the money paid. *Stevens* v. *Lyford*, 7 N. H. 360; *Holbrook* v. *Holbrook*, 30 Vt. 432; *Gillett* v. *Maynard*, 5 Johns. 85; *Wilson* v. *Van Winkle*, 7 Ill. 684; *Pharr* v. *Bachelor*, 3 Ala. 237; *Graham* v. *Chandler*, 38 Vt. 559; *Martin* v. *Howil*, 3 Brev. (S. C.) 547. So, too, where money has been paid to one for a certain purpose and he fails or refuses to perform as agreed, the payor may rescind the agreement and recover back the amount paid (*Appleton* v. *Chase*, 19 Me. 74); but if he has derived any benefit under the contract the amount of the benefit must be deducted. *Richards* v. *Allen*, 17 Me. 296. If a parol contract for the purchase of land is entered into and money is paid thereon, and the owner of the land refuses to convey (*Bennett* v. *Phelps*, 12 Minn. 327; *Congdon* v. *Perry*, 13 Gray, 3; *Marsh* v. *Wyckoff*, 10 Bosw. 202); or has conveyed it to another (*Goddard* v. *Mitchell*, 17 Me. 366); or cannot give a title to the premises (*Way* v. *Raymond*, 16 Vt. 371); without the default or wrong of the payor; or where the parties, by mutual consent, have rescinded the contract, he may recover back the money paid. *Graham* v. *Chandler*, 38 Vt. 559; *Beaman* v. *Simmons*, 76 N. C. 43; *Tompkins* v. *Seely*, 29 Barb. 212; *Smith* v. *Lamb*, 26 Ill. 396. But he cannot maintain the action so long as he is in the peaceable and undisturbed possession of the land (*Cope* v. *Williams*, 4 Ala. 362); nor

can a recovery be had, because the payee cannot convey a title to the premises, if the payor knew that he had no title when he paid the money (*Vest* v. *Weir*, 4 Blackf. [Ind.] 135); but if the parties suppose he has a title, when, in fact, he has not, a recovery may be had (*Holbrook* v. *Holbrook*, 30 Vt. 432); as in such a case the contract is a nullity. *Pipkin* v. *James*, 1 Humph. (Tenn.) 325. The same rule applies to contracts of all kinds, whether for real estate, personal property, services or for any purpose. Money paid in pursuance of a contract which is rescinded by the mutual consent of the parties, or by reason of the laches or default of the payee, may always be recovered back if the payor is not in default in any respect. But in order to recover, the rescission must be complete. It cannot be affirmed in part and rescinded in part, except by mutual consent (*Miner* v. *Bradley*, 22 Pick. 457); nor can it be recovered back if both parties are in default (*Bales* v. *Weddle*, 14 Ind. 349); nor if the contract still remains executory and open. *Banks* v. *Adams*, 23 Me. 259.

§ 24. **Failure of title.** Where money is paid for personal property in ignorance of the facts, the law implies a warranty of title, and if it turns out that the vendor had, in fact, no title, the money may be recovered back (*Sanders* v. *Hamilton*, 3 Dana [Ky.], 550; *Stuart* v. *Wilkins*, Doug. 17, 21; *Phelps* v. *Conant*, 30 Vt. 277; *Dutricht* v. *Melchor*, 1 Dall. [Penn.] 428); and the same rule applies where a person has entered into a contract to sell or has sold real estate to which he can give no title (*Earle* v. *Bickford*, 6 Allen, 549; *Way* v. *Raymond*, 16 Vt. 371; *Dill* v. *Wareham*, 7 Metc. 438; *McLean* v. *Martin*, 45 Mo. 393); except in cases where the purchaser knows the nature of his title or claim thereto, or where, without fraud on the vendor's part, the purchase simply involves a quit-claim deed. *Soper* v. *Stevens*, 14 Me. 133; *Sheldon* v. *Harding*, 44 Ill. 68; *Clare* v. *Lamb*, L. R., 10 C. P. 334; 12 Eng. Rep. 399; 23 W. R. 389. But, in order to warrant a recovery, the failure of title must be complete, so as to amount to a complete nullity. See p. 501, § 23; *Earle* v. *Bickford*, 6 Allen, 549. Where the purchaser knew the nature of the vendor's title at the time of purchase and there was no promise to perfect it, the money paid cannot be recovered back. *Woodard* v. *Cowing*, 13 Mass. 216; *Soper* v. *Stevens*, 14 Me. 133; *Chapman* v. *Spellerr*, 14 Q. B. 621; Jur. 652; *Putenbaugh* v. *Winchester*, 29 Ill. 194.

§ 25. **Moral or equitable consideration.** Where there is no fraud on the part of the payee, nor mistake in a matter of fact, money paid to one where there is no legal, but is in fact a moral obligation to pay it, cannot be recovered back. *Lowry* v. *Bourdieu*, Doug. 468; *Andree* v. *Fletcher*, 3 T. R. 266. The action is an equitable one, and the

rights of the parties are settled upon equitable principles, therefore, whenever the defendant, upon *equitable* grounds, is entitled to retain the money, it cannot be recovered back. It is a liberal action, and will lie in all cases where *ex æquo et bono* the defendant ought to have refunded the money, and not otherwise. *Morris* v. *Tarin*, 1 Dall. (Penn.) 147; *Jamison* v. *Ludlow*, 3 La. Ann. 492; *Foster* v. *Kirby*, 31 Mo. 496; *Farmer* v. *Arundel*, 2 W. Bla. 824. Thus where money is paid upon a debt barred by the statute of limitations (*Foster* v. *Kirby*, 31 Mo. 496; *Bize* v. *Dickason*, 1 T. R. 285), or where he pays the balance of a debt that he had previously been discharged from by payment of a part of the amount due (*Jamison* v. *Ludlow*, 3 La. Ann. 492; *Wilson* v. *Ray*, 10 Ad. & El. 82), or where money is paid under a contract void under the statute of frauds, which the other offers to perform, the money cannot be recovered back, because, although there was no legal, yet there was a moral obligation to pay, and the law, applying the doctrines of strict equity between the parties, will not permit it to be recovered back (*Marsh* v. *Wykoff*, 10 Bosw. [N. Y.] 202; *Congdon* v. *Perry*, 13 Gray, 3; *Bennett* v. *Phelps*, 12 Minn. 327), and, generally, in all cases where, in equity and good conscience, the payor ought to have paid the money, he cannot recover it back, although, legally, he was under no obligations to pay it. *Edgar* v. *Shields*, 1 Grant's Cas. (Penn.) 361; *New York* v. *Erben*, 10 Bosw. (N. Y.) 189; *Jackson* v. *Ferguson*, 2 La. Ann. 723; *Bize* v. *Dickason*, 1 T. R. 285; *Cartwright* v. *Rowley*, 2 Esp. 723.

§ 26. **Payments not credited or applied.** Where money is paid upon a debt or obligation against the payor, and not credited to the payor thereon, and the claim is afterward sued and a judgment for the full amount recovered which is paid, the person paying it cannot maintain an action for the sums paid by him, but which were not credited. If he sets up such payments in defense, he is precluded, because the facts have been found against him; if he fails to do so, he waives the claim and is estopped from ever afterward setting up any legal claim thereto (*Corey* v. *Gale*, 13 Vt. 639; *Weeks* v. *Thomas*, 21 Me. 465; *Loring* v. *Mansfield*, 17 Mass. 394; *Mitchell* v. *Sanford*, 11 Ala. 695; *Decker* v. *Adams*, 28 N. J. Law, 511; *Binck* v. *Wood*, 43 Barb. 315; *Hagar* v. *Springer*, 60 Me. 436); and the same rule applies where a person, *knowing* that he has paid money upon a claim which the other refuses to indorse or deduct from the claim, pays the whole of it. In such case, the payment is treated as voluntary. *Decker* v. *Adams*, 28 N. J. Law, 511. In such case, he is bound to resist the double payment, which he may do by tendering the sum actually due and compelling the holder to bring an action thereon, or he may

at once and before payment of any part of the claim, upon the refusal of the holder to deduct the amount, sue for and recover back the sum paid, of the person to whom he paid it. *Eastman* v. *Hodges*, 1 D. Chip. (Vt.) 101. Of course, the payment of money upon a negotiable instrument before it is due, which is not indorsed by the payee, where the note is transferred to a *bona fide* holder before due, may be recovered back, as the defense of payment in such case could not be made. But in all cases where the payment could be insisted on in defense to an action upon the claim, a payment without a deduction of the amount precludes the payor from ever recovering it back (*Loomis* v. *Pulver*, 9 Johns. 214), and this is the case whether the payment extended to a part only, or the whole of the claim. *Lewis* v. *Pulver*, id.; *Walker* v. *Ames*, 2 Cow. 428; *Fuller* v. *Shattuck*, 13 Gray, 70; *De Sylva* v. *Henry*, 3 Port. (Ala.) 132; *Tilton* v. *Gordon*, 1 N. H. 33. But, where money is paid to a person for one purpose, and he applies it to another, or if he refuses to apply it to the purpose designated, the payor may, although it was given to him to apply upon a particular debt due to him, instantly upon such wrongful appropriation or refusal to apply it as directed sue for, and recover it back, and this is generally the safest measure to adopt. *Eastman* v. *Hodges*, 1 D. Chip. (Vt.) 101; *Randolph* v. *Planters'*, *etc.*, *Bank*, 7 Rich. (S. C.) 134; *M'Nielly* v. *Richardson*, 4 Cow. 607; *Guthrie* v. *Hyatt*, 1 Harr. (Del.) 446.

Money paid upon a mortgage, whether of real estate or personal property, cannot be recovered back, although the mortgagee afterward forecloses his mortgage and takes all the mortgaged property thereon. The defendant can only save his rights by payment of the full sum due. *Fitch* v. *Coit*, 1 Root (Conn.), 266; *Morton* v. *Chandler*, 6 Me. 142. Of course, the doctrine previously stated, as to a second paying of a claim that has once been paid, does not apply where the payment is induced by duress (*Snowdon* v. *Davis*, 1 Taunt. 359), or where the previous payment had been made by another, and the payor was ignorant of the fact, or where the payment was made by mistake, or in forgetfulness of the previous payment. *Kelly* v. *Solari*, 9 M. & W. 54; *Lucas* v. *Worswick*, 1 M. & Robt. 293.

§ 27. **Payment upon award, judgment, execution, etc.** When money has been paid under an award of arbitrators, fairly obtained (*Bulkley* v. *Stewart*, 1 Day [Conn.], 130; *Homes* v. *Aery*, 12 Mass. 134); or upon a valid judgment rendered by a court of competent jurisdiction, it cannot be recovered back so long as such judgment remains in force (*Kirkland* v. *Brown*, 4 Humph. [Tenn.] 174; *Morton* v. *Chandler*, 7 Me. 45; *White* v. *Ward*, 9 Johns. 232; *Homer* v. *Fish*, 1 Pick. 439; *Gordon* v. *Mayor of Baltimore*, 5 Gill [Md.], 231;

Holden v. *Curtis*, 2 N. H. 61; *Binck* v. *Wood*, 43 Barb. 315); and this is so, no matter how unjust the judgment may be, as where it is for the full amount of a claim, a part of which has been already paid (*Footman* v. *Stetson*, 32 Me. 17; *Binck* v. *Wood*, 43 Barb. 315; *Hagar* v. *Springer*, 60 Me. 436; *Broughton* v. *McIntosh*, 1 Ala. 103); and the same rule prevails as to money paid on foreign judgments. *Rapelje* v. *Emory*, 2 Dall. (Penn.) 231; *Messier* v. *Amery*, 1 Yates (Penn.), 533. The rule is not affected by the fact that the claim upon which the judgment was rendered was for property, the title to which has failed (*Holden* v. *Curtis*, 2 N. H. 61); or that it had in fact been previously paid. *James* v. *Cavit*, 2 Brev. (S. C.) 174. There must be some final determination of disputes, and the law, upon grounds of public policy, invariably treats all judgments of competent tribunals, regularly entered, as conclusive upon the rights of the parties, until reversed or set aside. *Chace* v. *May*, Brayt. (Vt.) 25; *Carter* v. *Canterbury*, 3 Conn. 461; *Loring* v. *Mansfield*, 17 Mass. 394; *Cobb* v. *Curtis*, 8 Johns. 470.

Where, however, a judgment has been in whole or in part paid, and the creditor levies execution for and collects the whole, the amount previously paid may be recovered back, as in such case the money is treated as having been paid over again by compulsion of legal process. *Natchez Ins. Co.* v. *Helm*, 21 Miss. 182; *Hale* v. *Passmore*, 4 Dana (Ky.), 70; *Catterlin* v. *Somerville*, 22 Ind. 482.

§ 28. **Payment of judgments afterward reversed.** While a judgment is in full force, it is binding upon the parties, and its payment, whether voluntarily or by enforced collection, is conclusive upon the parties, but if, after payment, the judgment is reversed, the money paid may be recovered back in an action for money had and received (*Williams* v. *Simmons*, 22 Ala. 425; *Duncan* v. *Kirkpatrick*, 13 S. & R. [Penn.] 292; *Maghee* v. *Kellogg*, 24 Wend. 32; *Jamaica* v. *Guilford*, 2 D. Chip. [Vt.] 103; *Glover* v. *Foote*, 7 Blackf. [Ind.] 293); unless there are some equitable grounds upon which the judgment creditor is still entitled to retain it (*Stewart* v. *Conner*, 9 Ala. 803; *Dupuy* v. *Roebuck*, 7 id. 484); as where a judgment against a garnishee was reversed for a mere irregularity, and it appeared that the amount he paid thereon was justly due to the original defendant, and by him to the original plaintiff, it was held that it could not be recovered back. *Duncan* v. *Ware*, 5 Stew. & Port. (Ala.) 119. In the absence, however, of any such equitable grounds for its retention, it may be recovered back, even though a new trial is ordered, as the right of recovery dates from the reversal. *Bank of Washington* v. *Neale*, 4 Cr. (C. C.) 627.

§ 29. **Illegal taxes, assessments, etc.** An illegal tax, voluntarily paid, cannot be recovered back although paid under protest, unless the person to whom it was paid had authority to enforce its immediate payment. *Allentown* v. *Saeger*, 20 Penn. St. 421; *Stickney* v. *Bangor*, 30 Me. 404; *Second Universalist Society* v. *Providence*, 6 R. I. 235; *Morris* v. *Mayor of Baltimore*, 5 Gill (Md.), 244; *Christy* v. *St. Louis*, 20 Mo. 143; *Lima* v. *Jenks*, 20 Ind. 301; *Sandford* v. *New York*, 33 Barb. 147; *Bucknall* v. *Story*, 46 Cal. 589; 13 Am. Rep. 220; *Bradford* v. *Chicago*, 25 Ill. 411; *Watson* v. *Princeton*, 4 Metc. 599; *Campbell* v. *New Orleans*, 12 La. Ann. 34; *State* v. *Powell*, 44 Mo. 436; *Claycomb* v. *McCoy*, 48 Ill. 110; *Lee* v. *Templeton*, 6 Gray, 579. And this is so, even though he was, at the time when the tax was paid, not aware of its invalidity, unless its invalidity depended upon a certain state of facts of which the payor was not aware. *Kraft* v. *Keokuk*, 14 Iowa, 86; *Goddard* v. *Seymour*, 30 Conn. 394; *Espy* v. *Fort Madison*, 14 Iowa, 226; *Kansas Pacific R. R. Co* v. *Wyandotte Co.*, 16 Kans. 587.

But if taxes are paid to an officer having authority to enforce their payment immediately, the payment is not voluntary, and, if illegal, it may be recovered back. *Bradford* v. *Chicago*, 25 Ill. 411; *Sandwich Glass Co.* v. *Boston*, 4 Metc. 181; *Joyner* v. *School District*, 3 Cush. 567; *Trumbull* v. *Campbell*, 8 Ill. 502; *Hendy* v. *Soule*, Deady's C. C. 400; *Hubbard* v. *Brainard*, 35 Conn. 563. But, although the tax was illegal when paid, yet, if before a final judgment in an action to recover it back the tax is legalized, a recovery cannot be had. *Hyde* v. *New Orleans*, 11 La Ann. 191. When a tax is paid under a mistake of facts, as, where a tax levied upon land is paid by the mortgagor and afterward in ignorance of the fact is paid by the mortgagee, the mortgagor may recover it back. *Pierce* v. *Duncan*, 22 N. H. 18. When a tax is legal and valid but has been collected by proceedings that are irregular, the payor cannot recover the amount paid, because, the action being an equitable one, and, it being the duty of the tax payer to pay it without compulsion, it is equitable for the town, city or county to whom it was paid to retain it. *Goddard* v. *Seymour*, 30 Conn. 394. The same rules apply to assessments made upon property by municipal corporations. If they are paid voluntarily to one having no authority to enforce their immediate collection, they cannot be recovered back. *Second Universalist Society* v. *Providence*, 6 R. I. 235; *Kansas Pacific R. R. Co.* v. *Wyandotte Co.*, 16 Kans. 587. See *ante*, 493, § 16.

§ 30. **Money received from third persons for plaintiff's use.** Where a person, who has received money for the use of another, neglects or refuses to pay it over to his *cestui que trust*, the person entitled thereto may maintain an action against him as for money had and

received (*Phelps* v. *Conant*, 30 Vt. 277; *Ulmer* v. *Ulmer*, 2 N. & McC. [S. C.] 489; *Glascock* v. *Lyons*, 20 Ind. 1; *King* v. *Patterson, etc., R. R. Co.*, 29 N. J. Law, 504; *Catlin* v. *Birckard*, 13 Mich. 110; *Stockdon* v. *Bayless*, 2 Bibb [Ky.], 62); and it is of no importance how the money came into his hands, if the plaintiff is legally entitled thereto. Thus, where a sheriff sells the property of the landlord upon an execution against a tenant (*Thompson* v. *Merriman*, 15 Ala. 166; *Harris* v. *Miner*, 28 Ill. 135); or where a person receives payment of a debt due him from an agent in the money of his principal (*Rusk* v. *Newell*, 25 id. 226); or where an agent receives money for his principal, that he neglects to pay over (*Campbell* v. *Boggs*, 48 Penn. St. 524; *English* v. *Devarro*, 5 Blackf. [Ind.] 588); or where one receives money from the sale of property belonging to another (*Thompson* v. *Merriman*, 15 Ala. 166; *Stanwood* v. *Sage*, 22 Cal. 516); or where one wrongfully receives money belonging to another (*Platt* v. *Stout*, 14 Abb. Pr. [N. Y.] 178); or where money is placed in the hands of a person to be paid to another in discharge of a debt against him, which the depository neglects to pay (*Stoudt* v. *Hine*, 45 Penn. St. 30; *Lemon* v. *Grosskopf*, 22 Wis. 447; *Lewis* v. *Sawyer*, 44 Me. 332; *Draughan* v. *Bunting*, 9 Ired. [N. C.] 10); and, generally, where one receives money that, *ex æquo et bono*, belongs to another, the law implies a promise on the part of the person receiving it to pay it over to the true owner (*Norway* v. *Clear Lake*, 11 Iowa, 506; *Robbins* v. *Alton Ins. Co.*, 12 Mo. 380; *Stockdon* v. *Bayless*, 2 Bibb [Ky.], 62); and in all cases where money is held by a person, whether it came into his hands rightfully or wrongfully, that in fact belongs to another, the true owner may maintain an action against him for its recovery. *Jacobs* v. *Pollard*, 10 Cush. (Mass.) 287. Thus, where the acceptor of a bill, payable out of a particular fund, receives the fund but refuses to apply it in payment of the bill, the payee may recover the same of him in an action for money had and received. *Grammer* v. *Carroll*, 4 Cr. (C. C.) 400. So, where an attorney has discharged a debt due to his principal, he is liable to him for the full amount of the debt discharged, whether he in fact received the money thereon or not. *Beardsley* v. *Root*, 11 Johns. 464. So, where money belonging to the husband was appropriated by his widow upon his decease, the administrator was permitted to recover it in an action for money had and received. *Ferrell* v. *Underwood*, 2 Dev. (N. C.) L. 111. So, where a person took up cattle *damage feasant*, and C., a field driver, at his request, sold them, but the proceedings were irregular, and C. refused to pay over the money to him, it was held that an action for money had and received could be maintained by him against C., notwithstanding such irregularity. *Jacobs*

v. *Pollard*, 10 Cush. (Mass.) 287. So, where a drover took cattle to market for A and sold them and paid over the proceeds to him, it was held that he was liable in this form of action to B for the money received for the cattle, B having a chattel mortgage upon them. *Knapp* v. *Hobbs*, 50 N. H. 476. Thus, from the illustrations given, it will be seen that, whenever a person has money in his hands that belongs to another, no matter how he came into the possession of it, and upon which he has no legal or equitable claim, as against the true owner, and which he has no right to hold as against him, it may be recovered by the true owner, in this form of action. Id.; *Wyly* v. *Burnett*, 43 Ga. 438; *Emerson* v. *Baylies*, 19 Pick. 55; *Alderson* v. *Ennor*, 45 Ill. 128; *Gilman* v. *Cunningham*, 42 Me. 98; *Giddings* v. *Dudley*, 47 id. 51; *Heimbach* v. *Weimberg*, 18 Mich. 48.

§ 31. **By or against assignees, grantees, etc.** The question as to whether the assignee or grantee of a chose in action can maintain an action thereon, particularly so far as relates to actions for money had and received, depends entirely upon the fact whether the statute confers such right. At common law, the assignee can only sue in the name of the assignor, and the same rule prevails as to grantees, as to any matters occurring prior to the grant (*Smith* v. *Gray*, 1 Dev. & B. [N. C.] L. 42); but where an instrument, negotiable in its terms, is assigned, of course the assignee can sue thereon (*Ellis* v. *Essex, etc., Bridge*, 2 Pick. 243; *Rose* v. *O'Brien*, 50 Me. 188); or if the person against whom the claim exists has assented to the substitution of creditors. *Kent* v. *Watson*, 46 N. H. 148.

§ 32. **Payment over to principal, etc.** It is well settled that a person who acts as the agent of another is not liable personally upon any debt or obligation contracted by him in the name of his principal and on his behalf, consequently where money is paid to an agent on account of his principal, which he has actually paid over to his principal, the person paying it cannot maintain an action against him therefor, even though its payment was induced by the false and fraudulent representation of the agent (*Butler* v. *Livermore*, 52 Barb. 570; *Holland* v. *Russell*, 4 B. & S. 14; *Shand* v. *Grant*, 15 C. B. [N. S.] 324); but so long as the money remains in the agent's hands, an action lies against him for its recovery (*Law* v. *Nunn*, 3 Ga. 90; *Bartholomew* v. *Warner*, 32 Conn. 98; *Johnson* v. *Rutherford*, 10 Penn. St. 455; *Cox* v. *Prentice*, 3 M. & S. 344); and the same rule prevails as to sheriffs receiving money upon executions (*Bartholomew* v. *Warner*, 32 Conn. 98); tax collectors (*Law* v. *Nunn*, 3 Ga. 90); or any public officer (*Johnson* v. *Rutherford*, 10 Penn. St. 455); but does not apply to executors or administrators, or other persons who occupy the position

of *quasi* principals. *Heasley* v. *Dunn*, 5 B. Monr. (Ky.) 145; *Wilson* v. *Sergeant*, 12 Ala. 778.

§ 33. **Stakeholders, bailees, etc.** An action for money had and received will lie in favor of any person entitled thereto, for money in the hands of a stakeholder or bailee, even though it was deposited under an illegal agreement, provided the action is brought before the illegal act is consummated. *White* v. *Franklin Bank*, 22 Pick. 181; *Atlas Bank* v. *Nahant Bank*, 3 Metc. 581. Thus, a person who enters into a wager with another and deposits the money in the hands of a stakeholder may recover it back at any time before the result of it is ascertained, or (in the absence of any statute prohibiting it) before the money has actually been paid over to the other party. *Martin* v. *Hewson*, 10 Exch. 737; *Davenport* v. *Davies*, 1 M. & W. 570; *Hale* v. *Sherwood*, 40 Conn. 332; S. C., 16 Am Rep. 37. Where, however, a person is a bailee of money in a lawful transaction, and it is deposited with him for a specific purpose, and to be paid over to one or the other of two or more parties upon the happening of a certain contingency, it cannot be recovered back by the depositors, after such contingency has happened (*Bumford* v. *Shuttleworth*, 11 Ad. & El. 926); nor can it be recovered by the person entitled thereto, until all the conditions precedent to its payment have been fully complied with, and the transaction is complete. *Case* v. *Roberts*, Holt, 500; *Wilkinson* v. *Godefroy*, 9 Ad. & El. 536; *Edwards* v. *Bates*, 7 M. & G. 590; *Bartlett* v. *Dimond*, 14 M. & W. 49. Thus, where a note or bill of exchange has been left with a person for a specific purpose, and he wrongfully deposits it in bank and receives credit upon the joint security of that *and other securities*, an action for money had and received cannot be maintained against him, until the note or bill becomes due. *Atkins* v. *Owen*, 2 Ad. & El. 35; 6 N. & M. 309. But, if a note or bill is given to one to get it discounted, and he does so, but appropriates the money to a purpose different from that directed, he is liable in this form of action, although the note or bill is not due (*Palmer* v. *Jarmain*, 2 M. & W. 282); and, generally, in all cases, where a person receives money, or property that is converted by him into money, for a specific purpose, and he applies it wholly or in part to a different purpose, he is liable for it in this form of action. *Palmer* v. *Jarmain*, 2 M. & W. 282; *Parry* v. *Roberts*, 3 Ad. & El. 118. But, if, as has been previously stated, there are any conditions precedent to its payment by him to be performed, the action will not lie unless performance thereof is established. *Atlee* v. *Backhouse*, 3 M. & W. 633; *McCarthy* v. *Colvin*, 9 Ad. & El. 607.

§ 34. **Demand, tender, etc., before action.** Where a person has money in his possession that rightfully belongs to another, the law implies a promise on his part to pay it over to such person, and that, too, without any previous demand or request. *Hawley* v. *Sage*, 15 Conn. 52; *Utica Bank* v. *Van Gieson*, 18 Johns. 485; *Calais* v. *Whidden*, 64 Me. 249; *Spence* v. *Thompson*, 11 Ala. 746; *Rutherford* v. *McIvor*, 21 id. 750. In some of the States, however, a distinction is made between money that has rightfully come into the hands of a person, and that which he holds wrongfully, and a demand is held necessary in the former instance, but not in the latter. *Hinsdill* v. *White*, 34 Vt. 558; *Brannin* v. *Voorhees*, 14 N. J. Law, 590; *Boyd* v. *Logan*, Cooke (Tenn.), 394; *Stocks* v. *City of Sheboygan*, 42 Wis. 315. But where the money is held by the defendant to be applied to a specific purpose, within a specific time, an action cannot be maintained against him therefor until after such time has elapsed, unless a request to make such application is shown, and a refusal on his part. *Sawyer* v. *Tappan*, 14 N. H. 352. Where one has received counterfeit money from a person in payment of a debt, or as money, an action can be maintained against him for its amount without a previous demand, or without tendering back the counterfeit bill or coin (*Kent* v. *Bornstein*, 12 Allen, 342; *Watson* v. *Cresap*, 1 B. Monr. [Ky.] 195); but, *contra*, and holding that a tender and demand within a reasonable time must be made, see *Raymond* v. *Baar*, 13 S. & R. (Penn.) 318; *Salem Bank* v. *Gloucester Bank*, 17 Mass. 1. In all cases where money has been paid to one through either fraud or mistake, in order to recover it back, the party paying it must put the other party *in statu quo*. That is, where it is paid in pursuance of a contract obligatory upon the other party, but which the payor for any cause has a right to rescind, or where it is paid for property that was represented to be of a certain quality or kind, and which proves not to be of such quality or kind, the contract must be rescinded, or the property returned, before a right to recover back the money attaches. *Boas* v. *Updegrove*, 5 Penn. St. 516; *Reed* v. *McGrew*, 5 Ohio, 375; *Martin* v. *McCormick*, 4 Sandf. (N. Y.) 366; *Evans* v. *Gale*, 21 N. H. 240; *Meyer* v. *Shoemaker*, 5 Barb. 319; *Colville* v. *Besly*, 2 Den. 139. But where money is paid for an article which proves to be of *a less weight* than that contracted for, the contract need not be rescinded, but the excess may be recovered back, as an over payment. *Cushing* v. *Rice*, 46 Me. 303.

§ 35. **Jurisdiction of equity.** A court of equity has no jurisdiction to aid a party to recover back money paid to another upon a contract that has been rescinded, or that is alleged to be fraudulent, because the party has a full and complete remedy at law. *Sadler* v. *Robinson*,

2 Stew. (Ala.) 520; *Rogers* v. *Ingham*, 3 L. R. Ch. Div. 351; 46 L. J. Ch. Div. 322; 26 W. R. 338; *Kilgour* v. *Parker*, 3 J. J. Marsh. (Ky.) 577; *Adair* v. *Winchester*, 7 G. & J. (Md.) 114. There may be cases, however, where a discovery is necessary, or for other special reasons, where equity would interfere (*Adair* v. *Winchester*, 7 Gill & J. [Md.] 114. *Ante*, p. 469), although, generally, a court of equity has no jurisdiction.

§ 36. **Amount of recovery.** The recovery in actions of this class is limited to the sum justly due to the plaintiff, which is the amount of money in the hands of the defendant belonging to the plaintiff, with interest thereon from the time when it ought to have been paid to him *Frothingham* v. *Morse*, 45 N. H. 545; *Lawton* v. *Howe*, 14 Wis. 241; *Robinson* v. *Corn Exch. Ins. Co.*, 1 Robt. (N. Y.) 14; *Owing* v. *Owing*, 10 G. & J. (Md.) 267; *Rawlings* v. *Poindexter*, 22 Miss. 66; *Corbin* v. *Davenport*, 9 Iowa, 239.

ARTICLE II.

MATTERS OF DEFENSE.

Section 1. In an action for money had and received, it is competent for the defendant to show any facts that entitle him to retain the money, either upon legal or equitable grounds. *Meredith* v. *Richardson*, 10 Ala. 828; *Gehr* v. *Hagerman*, 26 Ill. 438. To attempt to enumerate the special defenses in actions of this class, would be superfluous and impossible, and they will readily suggest themselves in a given case. The main principles by which to test the matter is whether in equity and good conscience, in view of the special facts of a case, the defendant is entitled to retain the money *as against the plaintiff*. Not necessarily whether he has an absolute title to the money as against *any* person, but whether his right thereto is equal to the plaintiff's right. It need not necessarily be better. It is enough if he has an equal right thereto. *Irvine* v. *Hanlin*, 10 S. & R. (Penn.) 219; *Buel* v. *Boughton*, 2 Denio, 91; *Lockwood* v. *Kelsea*, 41 N. H. 185; *Eagle Bank* v. *Smith*, 5 Conn. 71.

CHAPTER XCIX.

MORTGAGE.

TITLE I.

MORTGAGE OF REAL PROPERTY

ARTICLE I.

OF MORTGAGES IN GENERAL.

Section 1. Definition and nature. A mortgage is the conveyance of an estate or property by way of pledge for the security of a debt, and to become void on payment of it. 4 Kent's Comm. 136. It is an estate created by a conveyance absolute in its form, but intended to secure the performance of some act, such as the payment of money and the like by the grantor or some other person, and to become void if the act is performed agreeably to the terms prescribed at the time of making such conveyance. 1 Washb. Real Prop. 475; *Mitchell* v. *Burnham*, 44 Me. 286. It is an estate upon condition defeasible by the performance of the condition according to its legal effect. *Erskine* v. *Townsend*, 2 Mass. 495. It is a pledge of real estate as a security for the payment of a debt. It is the accident of the debt, and defeasible upon its payment at any time before foreclosure. *Briggs* v. *Fish*, 2 Chip. 100. It is not only a lien for a debt, but a transfer of the property itself as a security for the debt. *Conard* v. *Atlantic Ins. Co.*, 1 Pet. 386. It is an estate at law upon which a real action may be maintained. *Dexter* v. *Harris*, 2 Mason, 531. A defeasance, either written in the instrument, or in a separate writing, or established by parol, is essential to a mortgage. Without a valid agreement, binding the grantee to reconvey or yield up to the grantor when the condition shall have been performed, it is not a mortgage. *Payne* v. *Patterson*, 77 Penn. St. 134.

Mortgages were at common law held to be conveyances upon condition, and unless the condition was performed at the appointed time, the estate became absolute; in equity, however, the debt was considered as the principal matter, and the failure to perform at the appointed

time, a matter merely requiring compensation by interest in the way of damages for the delay. This right to redeem became known as the equity of redemption, and it has been limited by statute, in the different States, to some limited number of years. Courts of law have now adopted the doctrines of equity with respect to redemption, and in other respects, to a considerable extent. 1 Washb. Real Prop. 477; *Jackson* v. *Willard*, 4 Johns. (N. Y.) 41.

The nature of the estate created by a mortgage is indicated by the etymology of its name—*mort-gage*—the French translation of the *vadium mortuum*, that is, dormant or dead pledge, in contrast with *vadium vivum*, an active or living one. They were both ordinarily securities for the payment of money. In the one there was no life or active effect in the way of creating the means of its redemption by producing rents, because, ordinarily, the mortgagor continued to hold possession and receive these. In the other the mortgagee took possession and received the rents toward his debt, whereby the estate worked out, as it were, its own redemption. Besides, in the one case, if the pledge is not redeemed, it is lost or dead as to the mortgagor; whereas, in the other, the pledge always survives to the mortgagor when it shall have accomplished its purposes. 2 Bouv. Law Dict. 197.

The mortgage is a mere lien or security, and passes no title in the land, but only a chattel interest. The debt is the principal, and the land the incident, and the equity may be sold and conveyed subject to the lien. Default in payment does not change its character, and payment before or after default extinguishes the lien. *McMillan* v. *Richards*, 9 Cal. 365. And where a lien on land conveyed is expressly reserved in a deed which is duly recorded, it creates a clear, equitable mortgage of which every one is bound to take notice, and the purchaser of the land at sheriff's sale takes nothing more than an equity of redemption, and holds the land subject to the lien for the unpaid purchase-money. *Davis* v. *Hamilton*, 50 Miss. 213.

A conveyance in the form of a deed of trust to secure the payment of a promissory note, and conditioned that, in case of failure to pay, the trustee shall sell, or, upon payment, reconvey, is, in effect, a mortgage. *Webb* v. *Hoselton*, 4 Neb. 308; 19 Am. Rep. 658. And where land is sold, and a written contract executed by the parties, whereby the vendor retains the title to the land as security for the unpaid purchase-money, and the vendee executes his notes for such purchase-money, the notes and contract will be considered as one instrument, and regarded as a security in the nature of a mortgage, which may be sold and assigned, and enforced in the name of the assignee by a decree in equity. *Wright* v. *Troutman*, 81 Ill. 374.

An agreement to give a mortgage, not objectionable for want of consideration, will be treated in equity as a mortgage. *Burdick* v. *Jackson*, 7 Hun (N. Y.), 488. See *Carter* v. *Holman*, 60 Mo. 498; *Wright* v. *Shumway*, 1 Wis. 23; *Racouillat* v. *Sansevain*, 32 Cal. 375.

§ 2. **Who may make a mortgage.** The mortgagor must be a party having an interest in the land at the time of the transaction. *Payne* v. *Patterson*, 77 Penn. St. 134. So a mortgage of land, made by one who has a legal and equitable title to a moiety of the property, which the mortgagor affects to convey, passes only his legal right, although he had a power from the person who held the residue of the legal, but not of the equitable estate in the land, to sell and convey his right also, the mortgagor not having affected to convey any part of it under his power from the other person, although his deed purported to mortgage the whole, and the equitable title not being in the person who gave the power. *Shirras* v. *Caig*, 7 Cranch, 34. A party in possession under a parol contract to purchase can mortgage his interest (*Sinclair* v. *Armitage*, 1 Beasley [N. J.], 174); and if he completes the purchase and obtains the title, it inures to the benefit of the mortgagee. *Bull* v. *Sykes*, 7 Wis. 449.

§ 3. **What property may be mortgaged.** All kinds of property, real or personal, which are capable of an absolute sale, may be the subject of a mortgage; rights in remainder and reversion, franchises and choses in action, may, therefore, be mortgaged. But a mere possibility or expectancy, as that of an heir, cannot. 2 Story's Eq. Jur., § 1012; 4 Kent's Comm. 144. Every thing which is the subject of a contract, or which may be assigned, is capable of being mortgaged. *Neligh* v. *Michenor*, 3 Stockt. (N. J.) 539. But at common law, nothing can be mortgaged that does not belong to the mortgagor at the time when the mortgage is made. *Pierce* v. *Emery*, 32 N. H. 484. The obligee of a title bond has an interest which he may mortgage. *Baker* v. *Bishop Hill Colony*, 45 Ill. 264.

Where personal chattels are mortgaged, and subsequently attached to the freehold, under circumstances showing that, as between the parties, they are to be considered personal chattels still, a transfer of the mortgage, after the chattels have been thus attached, together with a purchase of the equity of redemption by the assignee, transfers the title to such mortgaged property. *Sheldon* v. *Edwards*, 35 N. Y. (8 Tiff.) 279.

§ 4. **Distinction between a mortgage and a conditional sale.** As a general rule, where a contract and conveyance are made upon a negotiation for a loan of money, a court of equity will construe the conveyance to be a mortgage, whatever may be the form of contract,

if the person to whom the application for the loan is made agrees to receive back his money with legal interest, or a larger amount, within a specified time thereafter, and to re-convey the property, where it is apparent that the real transaction is a loan of money. And gross inadequacy of price is always a strong circumstance in favor of the supposition that a sale of the property was not intended. *Holmes* v. *Grant*, 8 Paige (N. Y.), 243; *Hoopes* v. *Bailey*, 28 Miss. (6 Cush.) 328. But where a sale is made with an agreement for a re-purchase within a specified time, if the consideration paid upon the sale is near the cash value of the property conveyed, the absence of any agreement on the part of the vendor to repay the purchase-money, so as to make his right to re-purchase and the vendee's corresponding right to recover back his money mutual and reciprocal, is a strong circumstance in favor of construing the contract to be a conditional sale and not a mortgage. *Slowey* v. *McMurray*, 27 Mo. (6 Jones) 113; *Hill* v. *Grant*, 46 N. Y. (1 Sick.) 496. Although adequacy of price paid and want of obligation to repay the purchase-money are important facts to show a conditional sale, yet they are not conclusive. *Brown* v. *Dewey*, 2 Barb. 28; *Marshall* v. *Stewart*, 17 Ohio, 356. Whether the particular transaction constituted a mortgage, or a conditional sale, must always depend upon the whole circumstances of the contract and is not confined to mere written evidence of it. *Robertson* v. *Campbell*, 2 Call. (Va.) 421; *King* v. *Newman*, 2 Munf. 40; *Prince* v. *Bearden*, 1 A. K. Marsh. 170; *Oldham* v. *Halley*, 2 J. J. Marsh. 114; *Thompson* v. *Davenport*, 1 Wash. (Va.) 125. If it can be gathered from the whole of a deed that it was intended only as a security for the performance of a particular duty, it will be considered as a mortgage, although there is no express provision that, upon the fulfillment of the condition, the deed shall be void. *Steel* v. *Steel*, 4 Allen (Mass.), 417.

In all doubtful cases, a contract will be construed to be a mortgage rather than a sale, because such a construction will be most apt to attain the ends of justice and prevent fraud and oppression. *Honore* v. *Hutchings*, 8 Bush (Ky.), 687; *McNeill* v. *Norsworthy*, 39 Ala. 156; *Sears* v. *Dixon*, 33 Cal. 326; *Davis* v. *Stonestreet*, 4 Ind. 101; *Russell* v. *Southard*, 12 How. (U. S.) 139. Each case of this character must be decided in view of the peculiar circumstances which belong to it, as the only safe criterion is the intention of the parties. *Cornell* v. *Hall*, 22 Mich. 377. But equity will consider *any* writing by which property is transferred as a mortgage rather than an absolute sale, if the intent is doubtful. *Bright* v. *Wagle*, 3 Dana, 253; *Wilson* v. *Giddings*, 28 Ohio St. 554; *Hickman* v. *Cantrell*, 9 Yerg. 172; *Page* v. *Foster*, 7 N. H. 392.

A conveyance of real estate conditioned to be void on the payment of a certain sum at a specified time, otherwise to remain in full force and virtue, is a mortgage and not a conditional sale. *Ferguson* v. *Miller*, 4 Cal. 97. So, where a contract purports to be a sale, by the terms of which the purchaser is to sell the property, and out of the proceeds pay an antecedent debt of the seller, with interest and expenses, any excess to be returned to the seller, and any deficiency to be made good by him is in effect a mortgage. *Cannon* v. *McNab*, 48 Ala. 99.

Where a deed contained a stipulation that it should be void, if on a day certain the grantor paid the grantee the consideration money, and it appeared that the grantor wanted to borrow money and proposed the transaction; that the grantee gave no money but his own notes and that the grantor gave no notes, it was held that there was in fact no loan, and that the transaction was a conditional sale. *Pearson* v. *Seay*, 35 Ala. 612. So, too, where no circumstances appear showing an original intention that a deed absolute on its face should be considered as a mortgage, a subsequent bond to reconvey on payment of the consideration by the grantor makes the sale conditional but not a mortgage. *Swetland* v. *Swetland*, 3 Mich. (Gibbs) 482.

If a debtor makes an absolute conveyance of land to his creditor in payment of the debt, and, cotemporaneously with the execution of the deed, the creditor delivers to the debtor a written instrument by which he agrees to reconvey the land upon receiving payment of a certain sum within a specified time, the transaction does not create a mortgage but is a conditional sale, and the creditor obtains the fee of the premises subject only to the right of the debtor to demand a reconveyance on complying with the terms of the agreement. *Morrison* v. *Brand*, 5 Daly (N. Y.), 40. A deed upon condition is not a mortgage unless it is a security for a debt, or a demand in the nature of a debt. If the demand, on a breach of the condition, would be for unliquidated damages, it is not a mortgage. *Bethlehem* v. *Annis*, 40 N. H. 34.

In conditional sales the rule is that the vendor must comply strictly with the condition upon which his right to a reconveyance depends, or his right to the reconveyance of the property is lost. *Hoopes* v. *Bailey*, 28 Miss. (6 Cush.) 328; *Saxton* v. *Hitchcock*, 47 Barb. 220. And a deed, in its form a conveyance, may be shown to be a mortgage by external evidence, but a formal mortgage cannot be shown to be a conditional deed. *Kunkle* v. *Wolfersberger*, 6 Watts, 126.

The rule distinguishing between a mortgage and a conditional sale is thus stated in a recent case: A deed absolute in form, if intended to secure the payment of money, and the relation of debtor and credi-

tor exists between the grantor and the grantee at the time of its execution, will be treated as a mortgage. But where no such relation exists, and the grantor and grantee, at the time of the execution of the deed, agree in writing that the grantor shall have the option of repurchase in a given time at a certain price, the transaction is a conditional sale. *Slutz* v. *Desenberg*, 28 Ohio St. 371. See 1 Broom & Had. Com. (Wait's ed.) 608, *notes*.

§ 5. **Absolute conveyance with defeasance.** Whenever a conveyance transferring an estate is originally intended between the parties as a security for money, or for any other incumbrance, whether this intention appears from the same instrument or any other, it is always considered in equity as a mortgage, and consequently is redeemable upon the performance of the conditions or stipulations contained in it. *Elliott* v. *Wood*, 53 Barb. 285; *Breckenridge* v. *Auld*, 1 Robt. (Va.) 148; *Weed* v. *Stevenson*, 1 Clarke's Ch. 166. So an absolute deed of conveyance with a separate defeasance constitutes a mortgage. *Manufacturers & Mechanics' Bank* v. *Bank of Penn.*, 7 Watts & Serg. 335; *Corpman* v. *Baccastow*, 84 Penn. St. 363; *Perkins* v. *Dibble*, 10 Ohio, 33; *Ogden* v. *Grant*, 6 Dana, 473. And an absolute deed given merely as a security for the payment of money is a mortgage as much as if a defeasance were expressed in the body thereof, or executed simultaneously with it. *Odell* v. *Montross*, 68 N. Y. (23 Sick.) 499. Especially so, if the deed and defeasance bear even date, or are agreed upon at the same time. *Reitenbaugh* v. *Ludwick*, 31 Penn. St. 131; *Shaw* v. *Erskine*, 43 Me. 371. But it is not *necessary* that the dates of the instruments should be the same, it is sufficient if both be delivered at the same time. *Harrison* v. *Phillips' Academy*, 12 Mass. 456.

Although a conveyance of land merely as security for the loan of money with a separate defeasance is but a mortgage both as between the parties, and as to all who have notice of the transaction, yet to give proper notice of the transaction, the bond must be seasonably recorded (*Guthrie* v. *Kahle*, 46 Penn. St. 331), and such bond is seasonably recorded, if done before it is introduced in evidence, and before any change of title has taken place, or the right of any third party has attached. *Smith* v. *Monmouth, etc., Ins. Co.*, 50 Me. 96. A defeasance of a deed absolute on its face cannot be shown, at law, by parol. *Watson* v. *Dickens*, 12 S. & M. 608. Nor can a writing not under seal operate at law, as a defeasance. *Kelleran* v. *Brown*, 4 Mass. 443. See *contra*, *post*, 519, § 7; id. 523, § 3. But it can in equity. *Flagg* v. *Mann*, 14 Pick. (Mass.) 467.

If, after making a bond of defeasance from the grantee to the grantor in a deed, a deed has been given in accordance with its terms, but not

of the same date as the bond, and afterward the premises are reconveyed to the obligor, and it is agreed that the same bond shall continue in force for the same purpose, this will amount to a redelivery of the bond, and make the transaction a mortgage. *McIntier* v. *Shaw*, 6 Allen (Mass.), 83. Where an estate is conveyed as a security for the payment of a sum of money, intending it to be defeasible on payment of the money, or to be retained by way of a forfeiture on non-payment, the instrument is but a mortgage. *Halo* v. *Schick*, 57 Penn. St. 320.

§ 6. **Deed with contract to reconvey.** Where a person advances money, and at the same time receives a deed and gives a bond to the grantor for a reconveyance, the transaction is regarded as a loan and a security in the nature of a mortgage. *Sharkey* v. *Sharkey*, 47 Mo. 543; *Robinson* v. *Willoughby*, 65 N. C. 520; *Holton* v. *Meighen*, 15 Minn. 69; *Fiedler* v. *Darrin*, 59 Barb. 651. But where it appears that the parties to a deed, absolute on its face, intended an absolute sale, with simply the right to repurchase, the bond for reconveyance containing no condition which might stamp the transaction as a mortgage, such intention must govern and a prayer to redeem must be refused. *Pitts* v. *Cable*, 44 Ill. 103; *Morrison* v. *Brand*, 5 Daly (N. Y.) 40; S. C. affirmed, 56 N. Y. (11 Sick.) 657. And where the conveyance is made by the person to whom the consideration is paid, and the obligation is given to another, the transaction is regarded as an absolute sale. *Carr* v. *Rising*, 62 Ill. 14. But where the object of the transaction, evidenced by the deed and contract to reconvey, is to indemnify the creditor against a mortgage on other lands conveyed by debtor to creditor, and by him reconveyed, the transaction will in effect be a mortgage. *Archambau* v. *Green*, 21 Minn. 520. But where a deed and a contract to reconvey amount to and become an absolute sale with a conditional right of repurchase, although the two instruments are recorded together in the records of mortgages, that fact, as between the parties, does not change the nature of the transaction. *Morrison* v. *Brand*, 5 Daly (N. Y.), 40; S. C. affirmed, 56 N. Y. (11 Sick.) 657. A conveyance of land in fee, taking back a bond to reconvey upon repayment of the consideration money, and to permit the obligee meanwhile to occupy, paying rent equal to interest on that sum, is a mortgage. *Woodward* v. *Pickett*, 8 Gray, 617. A conveyance upon a grantee's parol promise to obtain thereby from a building association a loan, pay the grantor's liabilities, and reconvey to him when the loan should be repaid from the rents, is a mortgage. *Danzeisen's Appeal*, 73 Penn. St. 65. The grantees in possession under a deed absolute in form, but given by way of security merely, do not stand in exactly the same position, in reference to an accounting for the rents and profits, as ordinary mortgagees who have taken

possession by way of enforcing their security; they are agents of the grantors as well as mortgagees, and are chargeable for any failure to obtain full rental value for the premises only on the same ground as an agent thus put in possession. *Barnard* v. *Jennison*, 27 Mich. 230.

§ 7. **Deed intended as security.** An absolute deed will be valid and effectual as a mortgage, if it clearly appear that it was designed as a security for money; and this may be shown to be the intention and effect of the deed, by a cotemporaneous or subsequent writing, or by an agreement resting in parol. *Littlewort* v. *Davis*, 50 Miss. 403; *Weide* v. *Gehl*, 21 Minn. 449; *O'Neil* v. *Capelle*, 62 Mo. 202; *Judge* v. *Reese*, 24 N. J. Eq. 387; *Meehan* v. *Forrester*, 52 N. Y. (7 Sick.) 277; *Church* v. *Cole*, 36 Ind. 34; *Steinruck's Appeal*, 70 Penn. St. 289; *French* v. *Burns*, 35 Conn. 359. But only on purely equitable grounds will such a deed be declared to be a mortgage. *Hassam* v. *Barrett*, 115 Mass. 256. And clear proof is required before a court of equity will treat it as a mortgage. *Price* v. *Karnes*, 59 Ill. 276; *Henley* v. *Hotaling*, 41 Cal. 22; *Kent* v. *Lasley*, 24 Wis. 654; *Phillips* v. *Croft*, 42 Ala. 477. Whether such deed is a mortgage is a mixed question of law and fact. *Brown* v. *Clifford*, 7 Lans. (N. Y.) 46; *Baisch* v. *Oakeley*, 68 Penn. St. 92. And the burden of proof to show that it is a mortgage is upon the grantor. *Haines* v. *Thompson*, 70 Penn. St. 434.

The fact once established by the terms of the conveyance, or by other evidence, that the grant was intended as a mortgage, the rights of the parties are measured by the rules of law applicable to mortgagors and mortgagees; and the conveyance remains but a mortgage until the equity of redemption is foreclosed, and the mortgagee cannot have ejectment against the mortgagor or those claiming under him until after foreclosure. *Murray* v. *Walker*, 31 N. Y. (4 Tiff.) 399; *Decamp* v. *Crane*, 4 Green (N. J.), 166; *Holliday* v. *Arthur*, 25 Iowa, 19. It is not material that the conveyance should be made by the debtor, or by him in whom the equity of redemption will exist. It is sufficient if the debtor, and he who claims to occupy the position of mortgagor with the right of redemption, has an interest, legal or equitable, in the premises, and the grantee of the legal title has, and acquired such title by the act and assent of the debtor, and as a security for his debt. *Carr* v. *Carr*, 52 N. Y. (7 Sick.) 251; S. C., 4 Lans. 314. See *Farmer* v. *Grose*, 42 Cal. 169; *Moore* v. *Wade*, 8 Kans. 380; *Crane* v. *Decamp*, 21 N. J. Eq. 414; *Klinck* v. *Price*, 4 W. Va. 4; 6 Am. Rep. 268; *Robinson* v. *Willoughby*, 65 N. C. 520.

The fact that a deed, although absolute on its face, was made only as security for a loan or antecedent debt, may be shown by parol. *Phillips* v. *Hulsizer*, 20 N. J. Eq. 308; *Hills* v. *Loomis*, 42 Vt. 562;

Kent v. *Agard*, 24 Wis. 378. An instrument purporting to convey land, which, upon its face, discloses that it was intended as a security that title should be made to another tract, is a mortgage, though it recites that upon failure to discharge the lien, the instrument shall remain in full force and virtue as a deed. *Beale* v. *Ryan*, 40 Tex. 399. A deed of trust otherwise complete, but not containing the name of the trustee, will be enforced in equity as an equitable mortgage. The assignee of a note thereby secured will be subrogated to all the rights and equities of the assignor (*McQuie* v. *Peay*, 58 Mo. 56): so held as to the omission of a seal (*Harrington* v. *Fortner*, 58 Mo. 468); as to a mortgage not expressed to be sealed (*Jones* v. *Brewington*, 58 Mo. 210); as to the want of an acknowledgment. *Black* v. *Gregg*, 58 Mo. 565. A voluntary conveyance made to one creditor in order to defraud the grantor's other creditors will not be deemed an equitable mortgage, by proof of a subsequent oral agreement that the grantee shall reconvey on payment of the amount due him. Otherwise, if the relief be sought by the defrauded creditors. *Hassam* v. *Barrett*, 115 Mass. 256.

In an action to have a certain deed executed by the plaintiff declared a mortgage for the security of a loan of money and for a reconveyance of the property, the plaintiff will be entitled to the relief prayed for, upon establishing the transaction in which the deed was given to have been a loan of money, and not a sale of the premises on payment of the debt and interest at the time of redemption, although no tender was made and no offer of payment was inserted in the complaint. *Marvin* v. *Prentice*, 49 How. (N. Y.) 385. Where a party is in possession under a deed which, by construction of law, is converted into a mortgage, equity, before granting relief, will compel the owner to pay for repairs and improvements made on the faith of an absolute title, and which enhanced the value of the property to that amount. *Harper's Appeal*, 64 Penn. St. 315.

The distinction is well settled between an absolute deed of trust and a deed of trust in the nature of a mortgage, — the latter is conditional and defeasible; the former for the trust purposes unconditional and indefeasible. *Hoffman* v. *Mackall*, 5 Ohio (N. S.), 124.

Where a lien on land conveyed is expressly reserved in the deed, which is duly recorded, it creates a clear equitable mortgage of which every one is bound to take notice, and the purchaser of the land at sheriff's sale takes nothing more than an equity of redemption and holds the land subject to the lien for the unpaid purchase-money. *Davis* v. *Hamilton*, 50 Miss. 213; *Markoe* v. *Andras*, 67 Ill. 34.

An equitable mortgage may be created by deposit of the title deeds of a legal or an equitable estate as security for the payment of money,

or by a conveyance legal in its form of an equitable estate for that purpose (*Shaw* v. *Foster*, L. R., 5 H. L. 321); 2 Eng. Rep. 1); and if created in the former method, it must be forcelosed by a suit in equity to establish the lien, and for a sale, if the debt, interest and costs are not paid by a given day. *Jarvis* v. *Dutcher*, 16 Wis. 307. See, too, *Hackett* v. *Reynolds*, 4 R. I. 512; *Rockwell* v. *Hobby*, 2 Sandf. Ch. (N. Y.) 9. Under the statute of frauds of some of the States, a mortgage by the deposit of title deeds is not valid. *Vanmeter* v. *McFuddin*, 8 B. Monr. 435; *Shitz* v. *Dieffenbach*, 3 Barr. (Penn.) 233; *Probasco* v. *Johnson*, 2 Disney (Ohio), 96; *Meador* v. *Meador*, 3 Heisk. (Tenn.) 562; *Gardner* v. *McClure*, 6 Minn. 250. In Vermont it is an open question. *Bicknell* v. *Bicknell*, 31 Vt. (2 Shaw) 498.

ARTICLE II.

FORM AND REQUISITES.

Section 1. In general. At common law, a mortgage must be by deed and cannot be by parol, or by instrument not under seal. *Hebron* v. *Centre Harbor*, 11 N. H. 571. But in equity, no particular form of words is necessary to constitute a mortgage, and this is now the general rule. *Baldwin* v. *Jenkins*, 23 Miss. (1 Cush.) 206; *Cotterell* v. *Long*, 20 Ohio, 464. So, where two instruments taken together describe the premises and the amount of indebtedness, and convey the former as security for the latter, it is a sufficient mortgage. *Woodworth* v. *Guzman*, 1 Cal. 203. But a mortgage of property which contains no covenant or promise to pay the money secured by it, nor any express acknowledgment of indebtedness by the mortgagor, creates no personal liability. *Coleman* v. *Van Renssalaer*, 44 How. (N. Y.) Pr. 368. And no action to recover the debt will lie on such mortgage. *Weed* v. *Covill*, 14 Barb. 242. To constitute the mortgage, however, it is not necessary that there should be any collateral or personal security for the debt secured by the mortgage. *Smith* v. *Peoples' Bank*, 11 Shep. 185.

A material alteration made in a mortgage without the consent of the mortgagor, either by the mortgagee or by some other person, after delivery thereof and while the same is in the possession or custody of the mortgagee, has the effect of destroying and annulling the instrument. *Marcy* v. *Dunlap*, 5 Lans. (N. Y.) 365.

Where the grantee of land executes a written agreement to support and maintain the grantor, pledging for that purpose the produce of the land and, if that should not be sufficient, the entire fee, this agreement

being the consideration of the grant, he thereby executes a valid mortgage. *Chase* v. *Peck*, 21 N. Y. (7 Smith) 581; *Gilson* v. *Gilson*, 2 Allen (Mass.), 115.

The words "we mortgage the property," accompanied by a provision for the sale of it upon non-payment of money recited in the instrument as being thus secured, are sufficient to create a mortgage. *De Leon* v. *Higuera*, 15 Cal. 483. And a deed given on condition to be void and with a right of re-entry on the payment of a certain sum by the grantor, and with a bond of the like tenor, is a mortgage. *Knowlton* v. *Walker*, 13 Wis. 264.

§ 2. **Description.** No formal description of the debt to secure the payment of which the mortgage is executed is essential, provided there is a debt between the parties capable of being enforced against the debtor, or the property mortgaged. *Russell* v. *Southard*, 12 How. (U. S.) 139; *Smith* v. *Peoples' Bank*, 24 Me. 185; *Brown* v. *Dewey*, 1 Sandf. Ch. 56; *Rice* v. *Rice*, 4 Pick. 349. As where the condition is to support certain persons. *Mitchell* v. *Burnham*, 44 Me. 286. It is enough if it state correctly sufficient facts to identify the instrument with reasonable certainty. *Paine* v. *Benton*, 32 Wis. 491; *Gilman* v. *Moody*, 43 N. H. 239; *Ricketson* v. *Richardson*, 19 Cal. 330. And where the condition of the deed recites that the grantor was indebted to the grantee for moneys loaned, and his liability on divers bills of exchange and promissory notes, and it provides that if he discharge them within six months the deed shall be void, it will be a sufficient description of the debt, since it is capable of being made certain by parol evidence. *Hurd* v. *Robinson*, 11 Ohio St. 232; *Utley* v. *Smith*, 24 Conn. 290, 314.

But the description of the land sought to be mortgaged must be definite and certain. *Cochran* v. *Utt*, 42 Ind. 267. And where the land is described as a certain number of acres, "this day deeded" to a certain one, the mortgage is fatally defective on account of the vagueness and uncertainty of the description. *Nolte* v. *Libbert*, 34 Ind. 163. So, a mortgage to the State, executed for a loan of school funds, simply described the premises mortgaged by subdivisions without naming the county and State wherein they were located, the mortgage was held to be void for uncertainty in the description of such premises. *Murphy* v. *Hendricks*, 57 Ind. 593.

§ 3. **Mode of executing.** Where the terms by which a conveyance may be defeated are inserted in the deed by which the conveyance is made, the mortgage of course should be executed according to the same rule that governs deeds. But the rule is varied in different States where the defeasance is by a separate instrument made a part of the

same transaction as the deed. At common law, it is necessary that the instrument of defeasance should be of as high a nature as the deed itself which is to be defeated. *Lund* v. *Lund*, 1 N. H. 39; *Bodwell* v. *Webster*, 13 Pick. 411; *Richardson* v. *Woodbury*, 43 Me. 206; *Baker* v. *Wind*, 1 Ves. Sr. 160. It is impossible to create a lien by way of mortgage on real property by any instrument which is not a deed under seal. *Erwin* v. *Shuey*, 8 Ohio St. 510; *Schmidt* v. *Hoyt*, 1 Edw. Ch. 652; *Philips* v. *Bank of Lewistown*, 18 Penn. St. 394. In nearly all the States the defeasance may be shown by parol evidence that the object of the deed, as intended and understood by the parties, was to create a security. *Parish* v. *Gates*, 29 Ala 254; *McCurron* v. *Cassidy*, 18 Ark. 34; *Johnson* v. *Sherman*, 15 Cal. 287; *Shaver* v. *Woodward*, 28 Ill. 277; *Conwell* v. *Evill*, 4 Blackf. (Ind.) 67; *Despard* v. *Walbridge*, 15 N. Y. (1 Smith) 378; *Tibeau* v. *Tibeau*, 22 Mo. 77; *Vasser* v. *Vasser*, 23 Miss. 378; *Swetland* v. *Swetland*, 3 Mich. 482; *Miami Ex. Co.* v. *United States Bank*, Wright (Ohio), 252; *Kellum* v. *Smith*, 33 Penn. St. 158; *Nichols* v. *Reynolds*, 1 R. I. 30; *Rogan* v. *Walker*, 1 Wis. 527; *Hyndman* v. *Hyndman*, 19 Vt. 9. The rule is the same in the United States supreme court. *Russell* v. *Southard*, 12 How. (U. S.) 147. But the instrument or agreement offered to establish a defeasance must be entered into at the same time with the principal deed or original agreement. *Kelly* v. *Thompson*, 7 Watts, 401; *Montgomery* v. *Chadwick*, 7 Iowa, 114; *Scott* v. *McFarland*, 13 Mass. 309; *Bryan* v. *Cowart*, 21 Ala. 92.

A mortgage imperfectly executed is not absolutely void as between the parties thereto and all others having actual notice of its existence. As where it is insufficiently stamped (*Wilson* v. *Reuter*, 29 Iowa, 176); or has but one witness, when more by statute are required. *Sanborn* v. *Robinson*, 54 N. H. 239; *Gardner* v. *Moore*, 51 Ga. 268. In Maryland, attestation is not essential to the validity of a mortgage. *Carrico* v. *Farmers', etc., Bank*, 33 Md. 235. And in Pennsylvania a valid mortgage may be created by a written instrument not under seal. *Woods* v. *Wallace*, 22 Penn. St. 171.

Written authority to fill blanks is essential to render a mortgage executed with blanks to be filled by another person obligatory on the mortgagor. So, where a husband and wife execute a mortgage on her lands, leaving blanks which are afterward filled up in the presence and with the consent of the husband, but in the absence of the wife, the mortgage will be void as against her. *Ayres* v. *Probasco*, 14 Kan. 175. But in Wisconsin it was held that where a note and a mortgage, otherwise fully executed, but with a blank in each for the name of the payee and mortgagee, were delivered to an agent who was to procure

a loan of money thereon for the maker, that this showed an intention that the agent should fill the blanks, and when so filled, the instruments were valid without a new execution and delivery. *Van Etta* v. *Evenson*, 28 Wis. 33; 9 Am. Rep. 486. And an instrument formally sealed and delivered is valid if left in the hands of the executing party without any thing to show that it was not intended to operate immediately, yet if a blank be left for the name of the obligor and of the mortgagee, it is not such a mortgage as the mortgagee is bound to accept. *Pennsylvania Co.* v. *Dovey*, 64 Penn. St. 260.

The husband who joins with and authorizes the wife to execute a mortgage upon her paraphernal property, for the purpose of improving it, cannot afterward, when the mortgage is sought to be enforced, set up by way of defense that the property mortgaged was community property, and the wife was without the power or authority to incumber it. Having signed the mortgage himself, he cannot be permitted to deny or to gainsay his own solemn act. *Stewart* v. *Boyle*, 23 La. Ann. 83.

A mortgage for purchase-money is a valid security even against a homestead, though not signed by the wife. *Amphlett* v. *Hibbard*, 29 Mich. 298. But where a mortgage on a homestead was executed and delivered as a complete instrument by the husband alone, with the understanding that his wife was not to join in the execution thereof, but her signature and acknowledgment are afterward fraudulently obtained by the mortgagee, who thereupon so alters the mortgage and acknowledgment as to make it appear a mortgage by them jointly, thus giving it the force of a lien upon the homestead, as well as upon other lands covered by the mortgage, the alteration was held to be material, and avoided the mortgage. *Cutler* v. *Rose*, 35 Iowa, 456.

§ 4. **Delivery.** Acceptance of the mortgage by the mortgagee is necessary to constitute a delivery; and if there be no delivery, there is no mortgage. *Freeman* v. *Peay*, 23 Ark. 439. There need not be an actual manual delivery of the instrument by the mortgagor to the mortgagee; but there must be some act on the part of both, which, in legal contemplation, would be equivalent to it. *Foley* v. *Howard*, 8 Clarke (Iowa), 56. The fact of acknowledgment and proof of a mortgage does not raise a conclusive presumption of delivery. *Bell* v. *Farmers' Bank*, 11 Bush (Ky.), 34; 21 Am. Rep. 205. Nor does the single fact that a mortgage of real estate is found upon the records of a county raise a presumption of its delivery and acceptance against the positive denial of the mortgagee, and those claiming under him, that he ever received such a mortgage, or had any knowledge thereof. *Foley* v. *Howard*, 8 Clarke (Iowa), 56. But the fact that a mort-

gage was written and signed by the mortgagor, and filed by him in the recorder's office for record, and that it is subsequently found in the mortgagee's possession, are, in the absence of evidence to the contrary, sufficient to show a delivery. *Haskill* v. *Sevier*, 25 Ark. 152.

Where a purchase-price mortgage has been executed and deposited in escrow to await completion of title in the mortgagor, in fulfillment of a verbal bargain by the mortgagee to sell the land to the mortgagor, and the title to the land in the meantime passes into other hands, the delivery of the mortgage in violation of the arrangement will not operate to make it a valid mortgage, binding upon the mortgagor. *Powell* v. *Conant*, 33 Mich. 396.

A delivery of a deed of trust to the trustee is not essential to its validity, nor can his renunciation of the trust invalidate the deed as a security. *Walker* v. *Johnson*, 37 Tex. 127.

Where, upon the dissolution of a partnership, one partner assumes the payment of a firm note, and executes a mortgage to the payee of the note to secure its payment, and as indemnity to the other partner against his liability thereon, a delivery of the mortgage to such other party is sufficient. *Conwell* v. *McCowan*, 81 Ill. 285.

ARTICLE III.

CONSTRUCTION AND EFFECT.

Section 1. In general. In equity a mortgage of lands is regarded as a mere security for money, a chattel interest or chose in action, the debt being considered as the principal, and the mortgage as the accessory or appurtenant thereto. *Timms* v. *Shannon*, 19 Md. 296. But where a party takes security upon land, by mortgage, for a debt or other liability, without a covenant to pay, and takes no bond or other separate instrument to secure such payment, he is confined to the lands mentioned in the mortgage for his remedy. *Van Brunt* v. *Mismer*, 8 Minn. 232; *Coleman* v. *Van Rensselaer*, 44 How. (N. Y.) 368. As between creditors the mortgage is not even to be considered an incumbrance until it be recorded, unless it is given for purchase-money. *Clawson* v. *Eichbaum*, 2 Grant's Cases (Penn.), 130. But a mortgage to secure the payment of a sum of money may be upheld although there is connected with it no other obligation or contract of the mortgagor, or of any other person, to pay the same. *Brookings* v. *White*, 49 Me. 479.

A mortgage only becomes effectually an estate in the grantee called the mortgagee, by the grantor or mortgagor failing to perform the condition. *Fay* v. *Cheney*, 14 Pick. 399; *Brigham* v. *Winchester*, 1

Metc. 390 ; *Wood* v. *Trask*, 7 Wis. 566. In Texas the effect of a mortgage to secure the purchase-money, executed simultaneously with the deed to the vendee, is that the legal title remains with the mortgagee or vendor of the lands ; but this does not prevent the interest of the mortgagor from being levied upon and sold. *Baker* v. *Clepper*, 26 Tex. 629. A mortgage given by one person, to secure the payment, at maturity, of notes executed by another, is no security for renewal notes substituted therefor. *Ayres* v. *Wattson*, 57 Penn. St. 360. And an agreement between a mortgagor and a mortgagee that a promissory note shall be substituted for the notes to a larger amount already secured by mortgage, and, if paid at maturity, shall be considered a payment and discharge *pro tanto* of those notes and mortgage, and that the mortgage shall be held as collateral security for the new note, and not be discharged or canceled until that is paid, does not create a trust in or lien upon the mortgaged property to secure its payment. *Grafton Bank* v. *Foster*, 11 Gray (Mass.), 265.

A mortgage, by a corporation, of their property, franchises and effects, given after their entry upon lands which they had a right to take, and before judgment for damages for such taking, will bind their equitable interest, subject to the payment of the judgment for purchase-money. *Appeal of Easton*, 47 Penn. St. 255. Where a man, having no title to land, mortgages it and then subsequently acquires title, such title inures to the benefit of the mortgagee. *Christy* v. *Dana*, 34 Cal. 548 ; *Amonett* v. *Amis*, 16 La. Ann. 225.

A mortgagee, after having duly assigned his bond and mortgage to the plaintiff, received payment thereof from the mortgagor, who paid the same in ignorance of the assignment, believing him to be still the owner of the mortgage. Subsequently, upon the demand of the mortgagor, the mortgagee executed and delivered to the mortgagor a bond, conditioned to pay the full amount of the bond and mortgage to the plaintiff, and to save the mortgagor harmless therefrom, the payment of which bond was guaranteed by the defendant. Thereafter the mortgagor executed and delivered to the mortgagee satisfaction of the last-mentioned indemnity bond, which he did not, however, give up or cancel, but thereafter assigned it to the plaintiff. In an action by the plaintiff, to recover the amount of the bond and mortgage from the defendant, the guarantor of the bond, it was held that he was entitled to recover ; that the obligation under the bond, to the plaintiff, was not discharged by the act of the mortgagor. *Simson* v. *Brown*, 6 Hun (N. Y.), 251. See *Stephens* v. *Casbacker*, 8 id. 116.

An introductory recital in a mortgage, that the grantor was the owner of only one-third of the tract of land described in the deed, con-

tains no binding recognition of any right in any other person to any part of the land. *Mershon* v. *Mershon*, 9 Bush (Ky.), 633.

Where a mortgage, in describing property, employs at first general terms, and afterward proceeds to describe particularly each thing mortgaged, the latter will control the former if there be repugnancy. *Pullan* v. *Cinn., etc., R. R. Co.*, 4 Biss. 35.

A mortgage, made conditional on the removal of certain specified defects of title, is enforceable on performance of the condition, and cannot be defeated by a showing of other defects not specified in the condition. *Goodenow* v. *Curtis*, 33 Mich. 505. Nor can an objection to the terms of a mortgage by the mortgagor, before signing, that it included property which he desired to reserve and use in paying a debt to another, vary the legal effect of the mortgage. *Patterson* v. *Taylor*, 15 Fla. 336.

A deed of trust executed by a railroad company to trustees, conveying certain lands in trust, to sell and convey the same by deeds of conveyance, and to devote the proceeds to the payment of liabilities of the company, is not a mortgage, but vests the legal title in the trustees. *Soutter* v. *McRae*, 15 Fla. 625; *Wilmer* v. *Atlanta, etc., Ry. Co.*, 2 Woods' C. C. 447. Where, by agreement in a deed of trust, the interest on a note, if not paid when due, should be compounded, the agreement is no waiver of the right to enforce its payment when due. *Waples* v. *Jones*, 62 Mo. 440. The assignee of a note secured by a deed of trust otherwise complete, but not containing the name of the trustee, will be subrogated to all the rights and equities of the assignor. *McQuie* v. *Peay*, 58 Mo. 56. An assignment of a certificate of purchase of land, issued by the State, by way of security for a debt due by the assignor to the assignee, operates as an equitable mortgage on the interest in the land which the assignor acquired by virtue of the certificate, and if the assignee pays money due the State on the certificate, in order to prevent a forfeiture of the assignor's title, the money so paid becomes a portion of the mortgage debt, and the court will enforce an equitable lien for the whole sum. *Hill* v. *Eldred*, 49 Cal. 399. Where a deed is made to a married woman and "her body heirs," as the legal effect of it is to give her a life estate and there is no restriction of alienation, it is competent for her, by uniting with her husband, to mortgage her estate and release her homestead, and such a mortgage creates a valid lien upon her interest in the land. *Hosmer* v. *Carter*, 68 Ill. 98. A stipulation in a mortgage, by which the mortgagee assumes the payment of a prior mortgage on the premises, does not render the mortgagee personally liable to the prior mortgagee for the prior mortgage debt. Such a stipulation is not a promise by the mortgagee to the

mortgagor for the benefit of the prior mortgagee, but is for the benefit of the mortgagor only, being intended to protect his property by advancing money to pay his debt. *Garnsey* v. *Rogers*, 47 N. Y. (2 Sick. 233; 7 Am. Rep. 440. Where a mortgage debt is payable in installments, the condition is broken by non-payment of the first installment, and the party may thereupon resort to his action of ejectment. *Reddick* v. *Gressman*, 49 Mo. 389.

A deed of trust for the benefit of a party who has given and intends to give letters of credit to the grantor, and upon whom the latter has drawn and intends to draw bills of exchange, providing that it shall be void if the grantor shall pay on a certain day the amount of the bills so drawn, and that otherwise the trustee shall proceed to sell and pay the amount remaining unpaid, is not a mortgage security for the payment of the bills, as such, and for the benefit of the holders thereof, but only for the indemnity of the drawee, and such holders cannot maintain a suit to have a deed of release of part of the trust property, made when the drawee was insolvent, and subsequent deeds thereof to innocent third parties, set aside, and to have such part sold for their benefit. *St. Louis, etc., Association* v. *Clark*, 36 Mo. 601.

Where a creditor agreed to remit part of the debt, on the debtor's giving him, for the balance, a mortgage with a proviso that, if the mortgage debt were not paid within two years, the whole of the original debt should be recovered; and the debt was not paid within the two years, the proviso was construed a penalty against which equity would relieve, and the mortgagee could only recover the smaller sum. *Thompson* v. *Hudson*, L. R., 2 Eq. 612.

§ 2. **Law of place.** A mortgage must be construed by the laws of the State where it is executed (*Beall* v. *Williamson*, 14 Ala. 55), and by the laws of the time of its execution and delivery. *Olson* v. *Nelson*, 3 Minn. 53. A contract of mortgage valid by the law of the place where it is made is valid everywhere. *Dobbin* v. *Hewett*, 19 La. Ann. 513. In the absence of proof it will be presumed that the common law obtains in the State where the mortgage is executed. *Beall* v. *Williamson*, 14 Ala. 55.

§ 3. **Evidence to explain or vary.** Parol evidence is admissible to show the character, purpose and consideration of an instrument. *Price* v. *Grover*, 40 Md. 102; *Babcock* v. *Lisk*, 57 Ill. 327; *O'Neill* v. *Capelle*, 62 Mo. 202; *Judge* v. *Reese*, 24 N. J. Eq. 387; *Sweetzer's Appeal*, 71 Penn. St. 264. It is admissible to show that a deed, absolute in its terms, was intended as a mortgage. *Walton* v. *Cronly*, 14 Wend. 63; *Littlewort* v. *Davis*, 50 Miss. 403; *Weide* v. *Gehl*, 21 Minn. 449. It is admissible in equity to show that the assignment of

a mortgage, absolute in form, was in fact a security for a loan. *Pond* v. *Eddy*, 113 Mass. 149. But parol evidence in such cases is not received to contradict an instrument in writing, but to prove an equity superior to it. *Saunders* v. *Stewart*, 7 Nev. 200; *Wilcox* v. *Bates*, 26 Wis. 465.

Where a mortgage describes the mortgage debt as "two promissory notes, bearing even date herewith, for the sum of $500, one payable in 1852, and the other payable in 1853, with interest to be paid yearly"; and the notes referred to, being produced and identified, were for $500 each, it was held that the notes were competent evidence to explain the mortgage, as against the mortgagor, or one who purchased the equity of redemption with notice that the mortgage was intended to secure both notes. *Crafts* v. *Crafts*, 13 Gray (Mass.), 360.

It is not requisite that the condition of a mortgage should be so completely certain as to preclude extraneous inquiry. *Youngs* v. *Wilson*, 27 N. Y. (13 Smith) 351. And where a note agrees in some respects with the description given in a mortgage, though it differ in others, it may be proved by parol to be the one intended in the mortgage. *Paine* v. *Benton*, 32 Wis. 491.

Where ejectment is brought by the grantee of a deed, absolute on its face, against subsequent grantees of the same estate, holding from the same grantor, such grantees may show by parol proof that the first conveyance was a mortgage. *Webb* v. *Rice*, 1 Hill, 606. But where a mortgage is executed with a condition to secure the payment of a promissory note, and is duly recorded, and the mortgagee, after condition broken, obtains a conditional judgment for possession, enters upon the execution of the writ of possession, holds the premises peaceably for more than a year, and then conveys them by a quit-claim deed, and the grantee afterward conveys to a person with warranty, in a real action between a subsequent mortgagee and the last grantee, parol evidence is not admissible to show that the first mortgage was, in fact, executed for the purpose of indemnifying the mortgagee upon a certain other transaction, and that the indemnity had been made effectual. *Clark* v. *Hobbs*, 11 N. H. 122.

A mortgage dated 1837, payable in 1830, is payable immediately and parol evidence cannot be given to vary this legal result. *Fuller* v. *Acker*, 1 Hill (N. Y.), 473. And the loss of a mortgage cannot be proved by the oath of the party claiming under it. *Ross* v. *McCartan*, 1 Brevard, 507. See vol. 1, 163.

Where, in place of part of a bond secured by mortgage for the payment of $1,500 in three yearly payments to a third person after the death of the mortgagee, a due bill of the mortgagor, payable to the

mortgagee at a different date, is substituted by parol arrangement some time after the giving of the mortgage, the lien of the mortgage will not be held to cover such due bill in the absence, at least, of a clear showing that such was the agreement when the exchange was effected. *Tucker* v. *Alger*, 30 Mich. 67.

Parol evidence may not be admissible to prove a deed, a mortgage against a subsequent purchaser for value without notice. *Hills* v. *Loomis*, 42 Vt. 562. But it is admissible in ejectment by one claiming under the grantor, against one claiming under the grantee's heirs. *Kent* v. *Agard*, 24 Wis. 378.

§ 4. **Nature and effect generally.** Where a deed is absolute on its face, a court of equity will not establish it as a mortgage unless the proofs are clear, consistent and convincing, that it was not an absolute purchase, and that the object of the transaction, as understood by both parties, was to create a security for money. *Phillips* v. *Croft*, 42 Ala. 477; *Shays* v. *Norton*, 48 Ill. 100; *Lane* v. *Dickerson*, 10 Yerg. 373; *Conwell* v. *Evill*, 4 Blackf. 67.

But in all doubtful cases a *contract* will be construed to be a mortgage rather than a sale, because such a construction will be most apt to attain the ends of justice and prevent fraud and oppression. *Honore* v. *Hutchings*, 8 Bush (Ky.), 687; *Kent* v. *Lasley*, 24 Wis. 654; *Cornell* v. *Hall*, 22 Mich. 377. The intention of the parties will control the form of the contract, and the circumstances under which it was executed may be looked to in determining what was their intention. *Eiland* v. *Radford*, 7 Ala. 724; *Crane* v. *Bonnell*, 1 Green's Ch. 264.

Where a deed and a written contract are simultaneously executed, in reference to real estate, and a pre-existing debt is shown, if there is a continuing obligation for the debt, the transaction is a mortgage, although the deeds expressly state that the debt was fully satisfied, and that the contract is intended as a conditional sale and not as a mortgage. *Ruffier* v. *Womack*, 30 Tex. 332.

Where one conveys to another his interest in certain mining property, and upon the next day the grantee executes to the grantor his bond, and thereby agrees to reconvey the same property after he shall take from the mine the amount of a certain note, the deed and the bond should be read together and in connection they constitute a mortgage, and the grantee of the equity of redemption, after satisfaction of the amount due on the note, is entitled to a release from the mortgagee. *Walker* v. *Tiffin Mining Co.*, 2 Col. T. 89.

A covenant by a debtor with his creditor to purchase certain lands and then mortgage them to him will be enforced in a court of equity,

by a decree of sale, as an equitable mortgage. *Wright* v. *Shumway*, 1 Biss. 23.

A deed absolute on its face may be shown to be intended as a mortgage, although there is no agreement in the defeasance for the payment of the debt. That fact may properly be considered with other circumstances in the case, but it is not conclusive. *Horn* v. *Keteltas*, 46 N. Y. (1 Sick.) 605; S. C., 42 How. Pr. 138. So where a deed is executed simultaneously with the grantor's taking from the grantee a bond for the repayment of money borrowed, the two instruments constitute a mortgage. *Clark* v. *Lyon*, 46 Ga. 202; *Robinson* v. *Willoughby*, 65 N. C. 520; *Decker* v. *Leonard*, 6 Lans. (N. Y.) 264.

An agreement for a resale to the vendor, dated one day after the deed from the vendor, is a mortgage transaction. *Gubbins* v. *Harper*, 7 Phil. Penn.) 276. And if it appear that a vendor was indebted to the vendee, and that he continued in possession after the sale, the inference is irresistible that the transaction was a mortgage and that the vendor can redeem. *Robinson* v. *Willoughby*, 65 N. C. 520. And where a deed is shown to be an open mortgage, all uncertainties operate against the mortgagee. *Kline* v. *McGuckin*, 25 N. J. Eq. 433.

Each complaint for failure of condition must be determined on its own merits, and no court can have authority to make a decree in advance which shall limit the amount of recovery for future violations. *Tucker* v. *Tucker*, 24 Mich. 426. The condition of a mortgage, that, if the mortgagor, the indorser of a note, should cause it to be paid, the mortgage should be void, is not intended to increase the indorser's liability on the note, and does not waive his right to have the maker sued. *Carlisle* v. *Chambers*, 4 Bush (Ky.), 268. And where a mortgage is given on lands, to secure the payment of certain promissory notes conditioned "that if any of the notes prove to be insolvent and worthless, the mortgage is to be good and valid, otherwise to be null and void," to constitute a breach of the condition, the notes, or some of them, must prove worthless. The mere non-payment of the notes does not constitute a breach. *Fotrow* v. *Merriwether*, 53 Ill. 275. But a condition that the mortgagor "shall promptly pay and discharge all notes or other papers of his, upon which the mortgagees shall become indorsers or acceptors, together with all charges accruing thereon, so as to save said mortgagees harmless by reason of their connection with such paper," is broken at once, upon a failure to meet such paper at maturity. *Butler* v. *Ladue*, 12 Mich. 173.

A court of law will not construe a mortgage executed by the mortgagor in terms to himself so as to make it a mortgage to the intended mortgagee. *Rackliffe* v. *Seal*, 36 Mo. 317. Where an equitable mort-

gagee covenants to reconvey, free from incumbrances, and by good and sufficient deed, he must be understood as referring to the same title that he has received from the mortgagor, and is not bound to convert an imperfect title received, into an estate in fee simple. *Parmelee* v. *Lawrence*, 44 Ill. 405. Where the plaintiff contracted with the defendant to sell him certain real property, and in order to effect the sale, executed to a third party a conveyance thereof, upon such third party's advancing to the plaintiff part of the purchase-money, and giving to the defendant a contract for a deed when the money he had advanced should be repaid, and the defendant giving the plaintiff security for the balance; as between the parties, the sale and conveyance were deemed a mortgage to secure the payment by the defendant to such third party of the sum advanced. *Purdy* v. *Ballard*, 41 Cal. 444.

A mortgage made without a power of sale by the mortgagee, and executed by a debtor directly to his surety, and to be void if the debts should be paid, is for the security of the creditors as well as of the surety; and a sale by the mortgagor, with the consent but without the joinder of the mortgagee, will be precluded, unless made also with the consent of the creditors, or with satisfaction of their debts. *Saylors* v. *Saylors*, 3 Heisk. (Tenn.) 525.

When a mortgagor covenants in the mortgage to insure the improvements on the mortgaged premises for a specific sum, his failure to insure for that sum constitutes such a default as will justify the mortgagee in selling the premises under a power contained in the mortgage, and it does not impair the mortgagee's right that the covenant was impossible of execution. *Walker* v. *Cockey*, 38 Md. 75.

Where a mortgage is given to a guardian to secure a debt due his wards, and subsequently a new guardian is appointed in his place, who, in ignorance of the existence of subsequent incumbrances upon the property, agrees that the time of payment of the mortgage debt shall be extended, and takes a new mortgage on the same property to secure its payment, but without releasing the first mortgage, the debt secured by the two mortgages being the same, should have the benefit of the lien of the first mortgage. *Drury* v. *Briscoe*, 42 Md. 154.

§ 5. **Evidence of indebtedness.** A mortgage duly acknowledged and recorded is admissible in evidence of the mortgagee's title to the land mortgaged, without first producing the notes which it was given to secure. *Smith* v. *Johns*, 3 Gray (Mass.), 517. But the ordinary recital "that the party of the first part, in consideration of the sum of $500 to him duly paid, has granted," etc., is not an admission of indebtedness from which a promise may be implied; neither is a recital

that "this grant is intended as a security for the payment of $500 and interest." *Coleman* v. *Van Rensselaer*, 44 How. (N. Y.) Pr. 368.

Where the condition of a mortgage is that the mortgagor shall pay "the just and full sum of all moneys" which he might owe to the mortgagees, "either as maker or indorser of any note or notes, or any bills of exchange, bonds, checks, overdrafts or securities of any kind, given by him, according to the conditions of any such writings obligatory executed by him to the mortgagees as a collateral security," the instrument calls for written evidences of debt, signed or indorsed by the mortgagor, and can be satisfied by no other; and it cannot be made available as a security for a debt not in writing. *Walker* v. *Paine*, 31 Barb. 213.

In legal intendment a note, after its indorsement, is payable to the order of the indorsee, and such description in a mortgage given to secure it is sufficient. And in suit to foreclose the mortgage when the petition recites the description of the mortgage as above, and at the same time counts on the note as payable to the order of the payee, parol evidence is proper to show that the note sued on is that intended to be secured by the mortgage. *Aull* v. *Lee*, 61 Mo. 160.

§ 6. **Merger of indebtedness.** A court of equity will consider a conveyance in fee simple of the mortgaged premises from the mortgagor to the mortgagee, to be or not to be a merger, according to the intent and interest of the parties and the demands of substantial justice and equity. *Edgerton* v. *Young*, 43 Ill. 464; *Lyon* v. *McIlvaine*, 24 Iowa, 9; *Stantons* v. *Thompson*, 49 N. H. 272; *Mallory* v. *Hitchcock*, 29 Conn. 127. This is the rule at law as well as in equity. *Walker* v. *Barker*, 26 Vt. (3 Deane) 710. And the rule is not affected by the fact that the mortgage includes other estates, of which the mortgagee is not the owner of the equity of redemption. *Knowles* v. *Carpenter*, 8 R. I. 548.

Where the legal and the equitable estate both become vested in the same person there will be no merger of the two estates in any case if it be for the interest of the owner to keep them distinct. *Mallory* v. *Hitchcock*, 29 Conn. 127; *Polk* v. *Reynolds*, 31 Md. 106; *Spencer* v. *Ayrault*, 10 N. Y. (6 Seld.) 202; *Wallace* v. *Blair*, 1 Grant's Cases (Penn.), 75; *Snyder* v. *Snyder*, 6 Mich. 470. In order to protect the mortgagee against an intervening title, the law will uphold the mortgage, even when the parties had undertaken to discharge it, unless injustice would be done thereby. *Stantons* v. *Thompson*, 49 N. H. 272; *Webb* v. *Meloy*, 32 Wis. 319. But the owner of lands who treats a mortgage upon the same, which has been assigned to him, as a valid instrument, and transfers it as such, is estopped from insisting, as against

the assignee or any one claiming under him, that in his hands it has merged and disappeared in the fee. *Powell* v. *Smith*, 30 Mich. 451. And when a party makes a mortgage of land by a deed absolute on its face, and the mortgagee gives back a bond, obligating himself to convey back the premises on payment of the debt, free from all incumbrances, by deed with full covenants of warranty, and afterward acquires a tax title to the premises, the court, on bill to redeem, will allow the mortgagee the sum advanced for the tax title, and require him to convey the whole title. *Clark* v. *Laughlin*, 62 Ill. 278.

The acquisition by a mortgagee, after his assignment or transfer of the mortgage, of the absolute title, does not merge the mortgage. *White* v. *Hampton*, 13 Iowa (5 With.), 259; *Purdy* v. *Huntington*, 42 N. Y. (3 Hand) 334; 1 Am. Rep. 532. But where the mortgagee, not having assigned his mortgage, takes a release of the equity of redemption, the whole estate is vested in him, and the mortgage is extinguished, unless the express or implied intent of the parties, or interest in the mortgagee, intervenes to prevent the merger. *Wilhelmi* v. *Leonard*, 13 Iowa (5 With.), 330.

In the absence of a special agreement to that effect, the taking of a new mortgage from the same party and on the same property will not merge or extinguish a prior mortgage. *Christian* v. *Newberry*, 61 Mo. 446; *Drury* v. *Briscoe*, 42 Md. 154. And where the purchaser of mortgaged premises, sold on a junior mortgage, subsequently purchased the judgment and decree of sale made on a prior mortgage foreclosure, this judgment does not thereby become merged in his title to the premises under the first foreclosure, nor prevent him from buying at the sale, either in his own name or by another. *Rawiszer* v. *Hamilton*, 51 How. (N. Y.) Pr. 297. But where a mortgagor sells the mortgaged premises, subject to the mortgage, and a third party, having purchased the mortgage, afterward, through several mesne conveyances, obtains title to the land, he thereby becomes vested with the estates of both mortgagor and mortgagee, the owner of the mortgage having acquired the primary fund for its payment, which is of value equal to the mortgage, he thereby occupies the position of one who has effected a strict foreclosure, and the mortgage debt must be regarded as paid, and not recoverable against the mortgagor. *Lilly* v. *Palmer*, 51 Ill. 331.

Where a party, at the instance of a mortgagor, pays part of the mortgage debt, but takes no assignment of the mortgage, he is not, by such payment, subrogated to the right of the mortgagee as against a subsequent mortgage; to effect such subrogation there must be something more than mere payment, and a silent receipt of the money by the first mortgagee. *Commonwealth* v. *Chesapeake, etc., Canal Co.*, 32 Md.

501. A conveyance of the mortgaged premises to the mortgagee by the mortgagor, after an assignment of the mortgage to a third party, does not work a merger of the mortgage. *White* v. *Hampton*, 13 Iowa (5With.), 259. Nor does a subsequent conveyance by the mortgagee, although recorded before the assignment, operate as a transfer of the previously recorded mortgage, within the recording acts. The assignee of the recorded mortgage holds a valid lien on the land as against such subsequent grantee, although the latter purchased without notice of the assignment, and had his deed first recorded. *Purdy* v. *Huntington*, 42 N. Y. (3 Hand) 334; 1 Am. Rep. 532. The fact that a mortgagor had occupied the premises for many years, paid the taxes, and regularly paid interest, which was received as such, warrants a finding that the mortgage has not been foreclosed. *Trow* v. *Berry*, 113 Mass. 139.

Where a mortgagee receives a conveyance of the equity of redemption, his estate under the mortgage will not merge, but will be kept alive to enable him to defend under it, as against the title of another, acquired since the execution of the mortgage, and prior to the conveyance of the equity, if such seems to be the intention of the parties in making the conveyance, and justice requires it. *Mulford* v. *Peterson*, 35 N. J. Law, 127; *Campbell* v. *Vedder*, 1 Abb. (N. Y.) App. Dec. 295; *Besser* v. *Hawthorn*, 3 Oreg. 129.

Where a mortgagor, having a right to redeem, takes from one who is assignee of a mortgagee in possession, a lease from month to month of the mortgaged premises, agreeing to pay a monthly rent, "and to quit and give up possession of said premises upon demand at the end of any month," he is not estopped to set up his right to redeem. It is not a necessary inference from the transaction that the parties intended to convert the assignee's claim into a legal title. *Atkinson* v. *Morrissy*, 3 Oreg. 332.

Where a mortgage is given upon land to secure the payment of several notes maturing at different times, and a foreclosure and sale is had for a part of the notes, leaving one note unpaid, and the holder of the unpaid note becomes a purchaser of the mortgaged premises and receives a master's deed, the legal and equitable title to the premises will be merged, and it will operate as a satisfaction of the mortgage and the remaining indebtedness, for the reason that the purchaser in such a case is presumed to have bought the land at its value less the unpaid note. *Robins* v. *Swain*, 68 Ill. 197.

Where the owner of a prior mortgage purchases the equity of redemption, his prior lien is not merged in the title thus purchased, so as to become subject to a second mortgage given by his vendor, but

where, after such purchase, the prior mortgagee sold the land at private sale to a third party for a price sufficient to pay off both mortgages, as well as the sum paid for the equity of redemption, his mortgage was satisfied by such sale, and on foreclosure of the second mortgage, equity will direct the proceeds of the foreclosure sale to be first applied to the payment of the second mortgage. *Webb* v. *Meloy*, 32 Wis. 319.

§ 7. **What title or interest passes.** The mortgagee has no title or estate in the lands mortgaged, but only a lien for the security of the debt. *Jackson* v. *Lodge*, 36 Cal. 28; *United States* v. *Athens Armory*, 35 Ga. 344; *Whitmore* v. *Shiverick*, 3 Nev. 288; *Clawson* v. *Eichbaum*, 2 Grant's Cases (Penn.), 130; *The Trustees of Union College* v. *Wheeler*, 61 N. Y. (16 Sick.) 88. But in Tennessee, the legal title to the land conveyed passes out of the mortgagor and vests in the trustee or mortgagee, but upon payment by the mortgagor of the debts secured by the mortgage the legal title to the property revests in him and the mortgage cannot be set up against him in a court of law or equity. *Carter* v. *Taylor*, 3 Head (Tenn.), 30. In Massachusetts a mortgage of land passes the grantor's title though only in mortgage. *Murdock* v. *Chapman*, 9 Gray (Mass.), 156.

An assignment of a mortgage in the common form passes only one's interest as mortgagee, and no other interest which he may have in the mortgaged premises. *Durgin* v. *Busfield*, 114 Mass. 492.

The assignee takes such interest, subject not only to the latent equities of the obligor and mortgagor, but of third persons having an interest in the mortgaged premises who are represented by the mortgagor. *Union College* v. *Wheeler*, 61 N. Y. (16 Sick.) 88; *Sims* v. *Hammond*, 33 Iowa, 368; *Mason* v. *Ainsworth*, 58 Ill. 163; *Twitchell* v. *McMurtrie*, 77 Penn. St. 383. So, where a mortgagee is responsible for a breach of trust committed by the mortgagor, his assignee, with notice, is subject to the same equity in enforcing the mortgage. *Mathews* v. *Heyward*, 2 S. C. 239. And where a mortgagor of lands sells and conveys the same to a third person subject to the mortgage, and such grantee sells to the mortgagee, the mortgage to be taken in part payment of the purchase-price, and to be given up and canceled as shown by a written contract between them to that effect, and afterward the mortgagee assigns the mortgage to a person who has notice of the rights of the vendor, such assignee takes the mortgage subject to such rights. *Sumner* v. *Waugh*, 56 Ill. 531; *Schafer* v. *Reilly*, 50 N. Y. (5 Sick.) 61.

An assignment of a debt carries with it the mortgage made to secure the debt, and, ordinarily, whoever owns the debt is likewise the owner

of the mortgage. *Kurtz* v. *Sponable*, 6 Kans. 395; *Holmes* v. *McGinty*, 44 Miss. 94; *Swartz* v. *Leist*, 13 Ohio (N. S.), 419; *Gower* v. *Howe*, 20 Ind. 396; *Herring* v. *Woodhull*, 29 Ill. 92.

A party paying a decree of foreclosure becomes invested with the rights of the mortgagee and the assignee in equity of the mortgage. And although the mortgage is, in fact, paid, yet equity will require it to subsist until every party who owes a duty under the mortgage shall have discharged it. *Wheeler* v. *Willard*, 44 Vt. 601. And where a party is so related to a mortgage that he is not personally liable upon it, but is obliged to pay it to save his estate, and he does pay it, the payment will be presumed to be made for that purpose, and in such case no assignment of the mortgage to the person paying it, nor proof of an intention on his part to keep it alive, is necessary to give him the benefit of it. *Walker* v. *King*, 44 Vt. 640. So, the payee of a promissory note, who transfers it by indorsement, and afterward, on failure of payment by the maker, is compelled to take it up, is entitled to enforce a mortgage executed by the maker to the indorsee while he held the note to secure it. *O'Hara* v. *Haas*, 46 Miss. 374.

A mortgage on lands which the mortgagor had previously contracted to sell passes only his actual interest, and one who acquires his title at a foreclosure sale takes it subject to the equities of the vendee in possession. *Laverty* v. *Moore*, 33 N. Y. (6 Tiff.) 658.

Where one executes a mortgage (which was duly recorded) on premises of which he has possession under a contract of sale, and afterward, procuring a deed of the premises, sells the same and takes a mortgage thereon for the purchase-money, which he assigns, assuring the assignee that the mortgage was the first lien, the assignee will be estopped from claiming a priority, although the records show a perfect chain of title sustaining his mortgage. *Crane* v. *Turner*, 67 N. Y. (22 Sick.) 437.

A conveyance of mortgaged premises, by way of mortgage, can operate only as an assignment of the mortgagee's interest in the mortgage. *Central Bank* v. *Copeland*, 18 Md. 305. The possession of the mortgagor is not adverse to the possession of the mortgagee, so as to prevent the assignment of the mortgage by the latter. *Murray* v. *Blackledge*, 71 N. C. 492.

The execution of a deed by the assignee of a mortgage to a third person, conveying all the grantor's "estate, title and interest" in the mortgaged premises, will not operate as an assignment of the mortgage. The mortgagee's interest is a mere chattel interest which is inseparable from the debt it was given to secure, and will not pass by a conveyance of the land. *Swan* v. *Yaple*, 35 Iowa, 248.

A deed of trust executed by a railroad company to trustees, conveying certain lands in trust, to sell and convey the same by deeds of conveyance, and to devote the proceeds to the payment of liabilities of the company, vests the legal title in the trustees. *Soutter* v. *McRae*, 15 Fla. 625; *Wilmer* v. *Atlanta, etc., Ry. Co.*, 2 Woods' C. C. 447.

A mortgage, given to administrators to secure a note given in renewal of a note secured by the debtor's mortgage of a part of the same premises to their intestate, is a conveyance to them in their representative character. *Wilkins* v. *Sorrells*, 45 Ala. 272. Where a person mortgages the lands on which he resides, which are part of the public domain, and subsequently acquires the title to the land, such title inures to the benefit of the mortgagee. *Christy* v. *Dana*, 34 Cal. 548.

The mortgagee in a mortgage, made to secure a negotiable promissory note which was given for the price of intoxicating liquors, sold in violation of law, may convey a good title thereto by assigning the same with the note before the maturity of the note to one who takes them for a valuable consideration without notice. *Taylor* v. *Page*, 6 Allen (Mass.), 86.

§ 8. **What property included.** In a mortgage of real estate will be included such articles as are essential to the use of the realty, have been applied exclusively to use in connection with it, are necessary for that purpose, and without which, or similar articles, the realty would cease to be of value. *Hoyle* v. *The Plattsburgh & Montreal R. R. Co.*, 51 Barb. 45; *Bond* v. *Coke*, 71 N. C. 97. A mortgage of a lease made by the lessee will carry the fixtures of that property which is in lease, and the power to remove which fixtures were in the tenant. *Meux* v. *Jacobs*, 7 L. R. H. L. Cas. 481; S. C., 13 Eng. R. 14, note; 44 L. J. Ch. 481; 23 W. R. 526; 32 L. T. (N. S.) 171. So, a mortgage, given on a ditch or flume in process of construction without any special provision, would include all improvements or fixtures then on the line located for the flume, as well as those which might thereafter be put thereon. *Union, etc., Co.* v. *Murphy, etc., Co.*, 22 Cal. 620. See, too, *Ex parte Jardine; In re McManus* L. R., 10 Ch. App. 1; 12 Eng. Rep. 743. And a mortgage, given to secure certain notes whereby it was made a lien on a mill and machinery in said mill till the payment of said notes, would embrace machinery placed in the building after the mortgage was given and before the notes were satisfied. *Johnston* v. *Morrow*, 60 Mo. 339. So, too, a mortgage executed by a railroad company upon its railroad, with the lands, tracks, buildings, privileges and franchises "together with all the locomotives, tenders, cars, carriages, tools and machinery owned or thereafter to be owned by the company, or in any way belonging to or appertaining to said road,

and to be used thereon," is valid in equity, in respect to subsequently acquired property. *Benjamin* v. *The Elmira, Jefferson & Canandaigua R. R. Co.*, 49 Barb. 441; *Philadelphia, etc., R. R. Co.* v. *Woelpper*, 64 Penn. St. 366; 3 Am. Rep. 596.

A mortgage by a railroad company of "all the present and future to be acquired property of the company, including the right of way and land occupied, and all rails and other materials used therein or procured therefor," includes the rolling stock of the road. *Pullan* v. *Cincinnati, etc., R. R. Co.*, 4 Biss. 35; *Hoyle* v. *The Plattsburgh and Montreal R. R. Co.*, 51 Barb. 45.

A mortgage, to secure advances to enable the mortgagor to erect a building, of "all his right, title and interest, which he now has in the foundation or stone works of said building, and which he may have in and unto said building, during its erection and completion and after it is completed," passes the land on which the building stands. *Greenwood* v. *Murdock*, 9 Gray (Mass.), 20.

Where a certain undivided interest in real estate was bequeathed to a son, and a life interest in certain other real estate to the widow, with directions that after her death it be sold and a distributive share given to the son, it was held that a mortgage executed by the son before the death of the widow, embracing all the right, title and interest in the property bequeathed to him by the father, did not embrace the property included in the widow's life estate. *Hauft* v. *Duncan*, 40 Iowa, 254.

The share of the grandchild of one of the daughters of the declarant, to which he was entitled as heir-at-law of his sister, under a certain declaration of uses, was held not to be embraced by the terms of a deed of mortgage from him to other parties where those terms were confined to "all the interest he may or will possess, either in his own right, or as heir-at-law of his mother, by reason of all or any of the deeds, conveyances and declaration of uses" mentioned in the deed of mortgage. *McPherson* v. *Snowden*, 19 Md. 197.

A house when removed from mortgaged land is no longer subject to a mortgage lien. *Buckout* v. *Swift*, 27 Cal. 433.

§ 9. **What indebtedness secured.** A mortgage is security only for the debt thereby secured, and cannot be held for other debts from the mortgagor even as against him; and the mortgagee will be compelled to discharge the mortgage upon the payment of that debt. *Beardsley* v. *Tuttle*, 11 Wis. 74. So, a mortgage to secure the mortgagee from all liability that he may incur by reason of his becoming surety or indorser on the notes of the mortgagor, does not secure notes given to the mortgagee for money lent by him to the mortgagor, and as evidence

of such loan. *Clark* v. *Oman*, 15 Gray (Mass.), 521. Nor is a mortgage given by one person to secure the payment, at maturity, of notes executed by another, security for renewal notes substituted therefor. *Ayres* v. *Wattson*, 57 Penn. St. 360. But a mortgage or other conveyance made as a security for a debt, evidenced by a note or bond, will operate as a security for the same continuing debt, though the evidence of it is changed by renewal or otherwise. But, if one deed of trust is executed as a substitute for a preceding one, the former will at once cease to have any validity or effect. *Re Wynne*, Chase's Dec. 227; *Ames* v. *New Orleans, etc., R. R. Co.*, 2 Woods, 206; *Appeal of Bank of Commerce*, 44 Penn. St. (8 Wright) 423. So, an agreement between a mortgagor and a mortgagee, that a promissory note shall be substituted for the notes to a larger amount already secured by mortgage, and, if paid at maturity, shall be considered a payment and discharge *pro tanto* of those notes and mortgage, and that the mortgage shall be held as collateral security for the new note, and not be discharged or canceled until that is paid, does not create a trust in, or lien upon, the mortgaged property to secure its payment. *Grafton Bank* v. *Foster*, 11 Gray, 265.

A mortgage securing certain payments, and the performance of an agreement, also provided that it should become security for the performance of a certain other agreement, should the mortgagor elect to perform the second agreement. After the election and notice by the mortgagor, such mortgage will become security for the performance of the second agreement, as effectually as if the same had been set forth in the mortgage. *Furbish* v. *Sears*, 2 Cliff. 454.

A mortgage expressed to be void in case certain payments should be made upon a certain executory contract for the delivery of malt, "the terms and method to be by notes of hand," but to remain in force if default should be made "in the payment of the money above mentioned, or any of said notes," is a security not only for the giving of the notes, but also for their payment on maturity. *Blood* v. *White*, 100 Mass. 357.

A mortgage which provides that, upon the full payment of the notes described in a certain other mortgage executed upon a given date, and recorded upon a given page of a specified volume of the records of another county, it shall be void, sufficiently indicates the amount secured to put subsequent purchasers upon inquiry. *Kellogg* v. *Frazier*, 40 Iowa, 502.

Where a mortgage is given to secure whatever amount of indebtedness may at any time thereafter exist from the mortgagor to the mortgagee, a bank, the mortgage is not restricted by the proviso to the in-

debtedness of the mortgagor to the bank, arising from direct dealings between them, but is security also for the amount of notes made by the mortgagor to the order of a third person, and by him indorsed to the bank and discounted for him. *First Nat. Bank* v. *Byard*, 26 N. J. Eq. 255.

Where in place of part of a bond secured by mortgage, for the payment of $500, in three yearly payments, to a third person, after the death of the mortgagee, a due bill of the mortgagor, payable to the mortgagee, at a different date, is substituted by parol arrangement sometime after the giving of the mortgage, the lien of the mortgage will not be held to cover such due bill, in the absence at least of a clear showing that such was the agreement when the exchange was effected. *Tucker* v. *Alger*, 30 Mich. 67.

A payment by an indorser before protest, but, in order to save the notes from going to protest, the maker having informed him that he could not and would not pay them, is within the purview of the condition of a mortgage to pay the indorser all money he might be compelled to pay, and might pay, on account of the indorsement. *National State Bank* v. *Davis*, 24 Ohio St. 190.

§ 10. **Future advances.** A mortgage made to secure future advances is not invalid upon that account. Even if the intent to secure future advances is not disclosed by the terms of the instrument, yet if the mortgage is recorded and states a specific sum which it is intended to secure, so as to apprise third persons of the extent of the lien which may be claimed under it, it is good for subsequent advances except as against persons acquiring equities prior to the time when such advances are made. *Summers* v. *Roos*, 42 Miss. 749 ; 2 Am. Rep. 653 ; *D'Meza* v. *Generes*, 22 La. Ann. 285 ; *Farnum* v. *Burnett*, 21 N. J. Eq. 87 ; *Robinson* v. *Williams*, 22 N. Y. (8 Smith) 380 ; *Com. Bank* v. *Cunningham*, 24 Pick. 270 ; *Hubbard* v. *Savage*, 8 Conn. 215 ; *Foster* v. *Reynolds*, 38 Mo. 553 ; *Conard* v. *Atlantic Ins. Co.*, 1 Peters, 386.

In Connecticut it is said that such a mortgage, when recorded, is a valid and fixed security, not affected by a subsequent mortgage of the same property, though the advances may be made and the liabilities assumed after the record of such later mortgage. But where it is optional with the mortgagee to make the advances or not, and he has actual notice of a later mortgage upon the same property for an existing debt or liability, such later mortgage will take precedence of the prior one as to all advances made after notice of such later mortgage. *Boswell* v. *Goodwin*, 31 Conn. 74 ; *Rolt* v. *Hopkinson*, 3 DeG. & J. 177 ; S. C., 28 L. J. Ch. 41 ; 9 H. L. Cas. 514. The better rule would seem to be that a first mortgagee for future advances is bound to take notice of

junior and intervening incumbrances, in the same manner as if he were about to take a new and independent liability from the party, having no reference whatever to the prior incumbrance. *Bank of Montgomery's Appeal*, 36 Penn. St. 170; *Miller* v. *Lockwood*, 32 N. Y. (5 Tiff.) 293.

The sum named as the consideration of a mortgage, given as security for future advances or indebtedness and so stated therein, is of no importance. *Miller* v. *Lockwood*, 32 N. Y. (5 Tiff.) 293. But where it is given in bad faith for a greater sum than is due, to secure both a present indebtedness and future advances, as a pretended security, the mortgage would be invalid. *Tully* v. *Harloe*, 35 Cal. 302; *Griffin* v. *New Jersey, etc., Co.*, 3 Stockt. 49; *Fassett* v. *Smith*, 23 N. Y. (9 Smith) 252.

Where a mortgage is to secure future loans to an amount certain, within a time limited, and the full amount is loaned and repaid, further loans within the time limited will be covered by the mortgage as against subsequent purchasers. *Wilson* v. *Russell*, 13 Md. 494. But a mortgage, given on the understanding that the mortgagor shall have future credit, where the agent of the mortgagee, who took the mortgage, knew that it would not have been given except upon that understanding, cannot be enforced for a different purpose; and where no future credit is given, and no advances are made, the mortgage is without consideration. *Mizner* v. *Kussell*, 29 Mich. 229. But the mortgage would be valid if the credit had been given, to the extent of the credit given, or if the advances were made on the faith of the mortgage. *Marvin* v. *Chambers*, 12 Blatchf. 495.

A mortgage to secure "future advances, for the purpose of carrying on the farm for the year 1870, in the county," etc., sufficiently specifies the debt to secure which it is given. *Allen* v. *Lathrop*, 46 Ga. 133. The validity of a mortgage to secure future advances is not affected by the fact that the advances are to be of building materials in lieu of money. *Brooks* v. *Lester*, 35 Md. 65.

A national bank, organized under the national banking act of June 3, 1864, cannot take a mortgage, under sections 8 and 28, upon real estate, as a security for a debt concurrently created, or for future advances. *Kansas Valley National Bank* v. *Rowell*, 2 Dill. 371. Vol. 2, 179.

A mortgage may be given to secure the mortgagee from loss by reason of a liability that he may subsequently incur. *Goddard* v. *Sawyer*, 9 Allen (Mass.), 78. So, a mortgage may be given to indemnify the mortgagee for becoming surety or indorser. *Uhler* v. *Semple*, 20 N. J. Eq. (5 C. E. Gr.) 288; *Clark* v. *Oman*, 15 Gray (Mass.), 521.

§ 11. **Interest, costs, fees, etc.** A provision in a bond and mortgage that, if default should be made in the payment of interest when due and for a certain number of days thereafter, the principal with arrears of interest should, at the option of the mortgagee, become due immediately, is valid. *Rubens* v. *Prindle*, 44 Barb. 336; *Mobray* v. *Leckie*, 42 Md. 474; *Hosie* v. *Gray*, 71 Penn. St. 198. *Ante*, Vol. 3, 414, 161. Where such provision is made in a mortgage, it is not necessary that any particular form of words should be used for the purpose of declaring such option. *Harper* v. *Ely*, 56 Ill. 179; *Gulden* v. *O'Brien*, 7 Phil. (Penn.) 93. And if the mortgagee bring proceedings, on such failure to pay interest to foreclose for the full amount of the indebtedness, he makes his election and is entitled to foreclose for the entire indebtedness. *Kramer* v. *Rebman*, 9 Iowa (1 With.), 114. See, too, *Hartley* v. *Tatham*, 2 Abb. (N. Y.) App. Dec. 333. After a default has occurred, and the mortgagee has made his election accordingly, he cannot be compelled to accept the interest and waive the stipulation. Nor is he estopped from asserting his right of election, by the commencement of a foreclosure suit prior to the expiration of the time after due limited for the payment of interest, the complaint wherein simply sets up a default in the payment of an installment of principal then due and of the interest. Nor does he waive his right to elect by receiving the installment of principal. *Malcolm* v. *Allen*, 49 N. Y. (4 Sick.) 448. And in an action to foreclose a mortgage given to secure a bond containing a 30 days interest clause, where the complaint alleges the non-payment of interest and the election of the mortgagee that the whole become due, an order staying proceedings until further default cannot be granted in the absence of proof of fraud or improper conduct on the part of the plaintiff. *Bennett* v. *Stevenson*, 53 N. Y. (8 Sick.) 508.

Where a mortgage was recorded in full, and provided for the payment of interest during the ten years of the mortgage, at the end of which the balance of principal was to be paid, without saying how often during such time, is sufficient notice to a purchaser of such premises that some periodical payments of interest were intended. *Ackens* v. *Winston*, 22 N. J. Eq. 444.

The lien of a mortgage attaches equally for the debt and for the costs necessarily incurred in the enforcement of his rights. *Hurd* v. *Coleman*, 42 Me. 182. And it is competent for the mortgagor to covenant to pay a reasonable attorney's fee in case of foreclosure, and it will be presumed that such fee is to be in addition to the costs given by law. *Hitchcock* v. *Merrick*, 15 Wis. 522; *Cox* v. *Smith*, 1 Nev. 161. And a court of equity, where a mortgage authorizes the payment

of the expenses of the mortgagee, may pay out of the funds in his possession the taxed costs, and also such counsel fees in behalf of the complainants, as, in the discretion of the court, it may seem right to allow. *Bronson* v. *La Crosse R. R. Co.*, 2 Wall. (U. S.) 283; *Pierce* v. *Kneeland*, 16 Wis. 672.

A stipulation in a mortgage for two per cent to cover attorneys' fees, if resort be had to legal proceedings, is made in favor of the creditor, and is collectible with the principal debt. *Simon* v. *Haifleigh*, 21 La. Ann. 607; *Rawson* v. *Hall*, 56 Me. 142. But where a mortgage deed empowers the mortgagee in the usual manner to sell, rendering the surplus moneys to the mortgagor, after deducting the costs of the sale, and also, $100 as an attorney's fee, should any proceedings be taken to foreclose this indenture, such fee cannot be recovered upon a foreclosure in equity. *Sage* v. *Riggs*, 12 Mich. 313.

A reasonable attorney's fee in case of foreclosure may be stipulated for by an agreement subsequent to the mortgage, and recovered in the foreclosure suit. *Rice* v. *Cribb*, 12 Wis. 179.

Where in an act of mortgage it is stipulated that, in the event of the note not being paid at maturity, the attorney's fees for collection shall be paid by the debtor, if the suit for the collection of the note is unnecessarily brought, the fees cannot be secured by the creditor. *Alexandrie* v. *Saloy*, 14 La. Ann. 327.

A covenant in a mortgage for the payment by the mortgagor of all taxes that may be assessed upon the premises therein described cannot be enforced after the mortgage debt is discharged. *Hitchcock* v. *Merrick*, 18 Wis. 357. See, further, regarding interest, fees, etc., *post*, 558, Art. IV, § 9.

§ 12. **Performance, etc.** A tender and a refusal of the amount due on a mortgage before foreclosure, though after the law day, and though the tender be not always kept good, discharges the lien. *Kortright* v. *Cady*, 21 N. Y. (7 Smith) 343; *Columbian Build. Assoc.* v. *Crump*, 42 Md. 192; *Potts* v. *Plaisted*, 30 Mich. 149. But in view of the serious consequences to the holder of a mortgage on his refusal of a tender, and of the strong temptation to contrive merely colorable or sham tenders, not intended in good faith, the evidence should be full, clear and satisfactory that the tender was made in good faith, and was understood by such holder to be a present, absolute and unconditional tender, intended to be in full payment and extinguishment of the mortgage and not dependent upon his first executing a receipt or discharge, or any other contingency. *Potts* v. *Plaisted*, 30 Mich. 149.

Where a check upon a bank for the amount of the interest due upon a mortgage, tendered by the mortgagor to the mortgagee in payment of

such interest, is returned promptly to the mortgagor as not a legal tender, with the information that the interest must be paid at the residence of the creditor immediately, or he will proceed to foreclose the mortgage for both principal and interest, and the debtor has ample time to act on this information before the principal of the mortgage will become due for non-payment of the interest, but chooses to regard a tender he had made of the interest to a person not authorized to receive it, and by whom it was refused on that express ground, as a valid tender in law, equity will not relieve him from the position in which he has voluntarily placed himself. *Grussy* v. *Schneider*, 50 How. (N. Y.) Pr. 134.

The holder of a mortgage to whom a tender is proposed to be made is entitled to a reasonable opportunity to look over the mortgage and accompanying papers to calculate and ascertain the amount due; and if such papers are not present, he must be allowed a reasonable time to get them and to make the calculation; he is not bound under the penalty, or at the hazard of losing his entire debt, to carry at all times in his head, the precise amount due on any particular day. *Potts* v. *Plaisted*, 30 Mich. 149.

In New Jersey the rule is that an unaccepted tender of money secured by a mortgage on land, made after the day prescribed for payment, does not impair the lien of the mortgage. Such tender is neither a performance of the condition, nor a satisfaction of the debt; and its only effect is to stop the running of interest, and to subject the mortgagor to the necessity of resorting to his remedy in equity. *Shields* v. *Lozear*, 34 N. J. Law, 496; 3 Am. Rep. 256.

A mortgage is made void by a performance of the condition and no release or discharge is necessary, nor can the mortgage be continued in force by a parol agreement. *Merrill* v. *Chase*, 3 Allen, 339; *Hoyle* v. *Cazabat*, 25 La. Ann. 438; *Griffin* v. *Lovell*, 42 Miss. 402; *Donnelly* v. *Simonton*, 13 Minn. 301. But payment to a mortgagee does not extinguish the mortgage debt, if such is not the intention of the parties to the payment. *New Haven Savings Bank* v. *McPartlan*, 40 Conn. 90; *Peck* v. *Minot*, 3 Abb. (N. Y.) App. Dec. 465. So the renewal of a note secured by mortgage is not such a payment as will discharge the mortgage, unless so intended. *Parkhurst* v. *Cummings*, 56 Me. 155. And the deposit of the amount of a mortgage in a bank, with notice to the mortgagee, who thereupon receipted the bond and canceled the mortgage of record, is not a payment, where ten days afterward the bank stopped payment, and the money not having been drawn out, the receipt was canceled and a memorandum was appended to the record that the cancellation was entered by mistake by the

mortgagee. *Middlesex* v. *Thomas*, 20 N. J. Eq. (5 C. E. Gr.) 39. And the rule that payment by a mortgagor is an extinguishment does not obtain where the payment is of an incumbrance existing before the conveyance to him. *Abbott* v. *Kasson*, 72 Penn. St. 183.

Where a married woman joins her husband in the execution of a mortgage, given to secure the purchase-money of land, and relinquishes her dower therein, and, afterward, during the life-time of the husband, his assignee sells all his property, including the mortgaged premises, and with the proceeds pays off the mortgage, the wife's right to dower in the mortgaged premises is revived. *Atkinson* v. *Stewart*, 46 Mo. 510; *Hitchcock* v. *Harrington*, 6 Johns. 290.

A sufficient lapse of time in certain cases will raise a presumption of payment of the mortgage, especially against the mortgagee or his assignee in possesssion. *Buckmaster* v. *Kelley*, 15 Fla. 180. But when a mortgagor has retained possession of the mortgaged premises for more than twenty years after the execution of the mortgage and has acknowledged the debt and paid interest upon it within twenty years, there is no presumption that the debt is discharged. *Howard* v. *Hildreth*, 18 N. H. 105; *Wright* v. *Eaves*, 10 Rich. Eq. (S. C.) 582. Nor will the presumption be raised although the mortgagee or his assigns are in possession when the mortgagor became insolvent and died before the debt fell due, and his vendee of the equity of redemption also became insolvent and removed from the State, never afterward returning. *Brobst* v. *Brock*, 10 Wall. 519. But the presumption of payment of a mortgage, arising from the lapse of over twenty years from the time when the mortgage money became due, will not be repelled by proof of a payment made by the mortgagor after he has sold nd conveyed the mortgaged premises to another person, so far as the purchaser and those claiming under him are concerned. *The N. Y. Life Ins. & Trust Co.* v. *Covert*, 29 Barb. 435; 6 Abb. (N. S.) 154; 3 Abb. Ct. App. 350; 3 Trans. App. 24. A payment by a mortgagor to the holder of the mortgage, made and received as a premium for an extension of the time for payment of the principal of the mortgage, should be credited on the mortgage as of the time when the payment was made. *Laing* v. *Martin*, 26 N. J. Eq. 93; *Church* v. *Maloy*, 9 Hun (N. Y.), 148

Each installment of a mortgage payable in installments is so far separate from the rest under the statute, that payment before decree, in a suit to foreclose for a single installment, puts an end to the suit. *Brown* v. *Thompson*, 29 Mich. 72. Money paid to a mortgagee by an insurance company under its agreement with the mortgagor, cannot be applied by him to the payment of the debt before it is due, without

the mortgagor's consent. *Gordon* v. *Ware Savings Bank*, 115 Mass. 588. But a payment upon a bond and mortgage made by the mortgagor to the mortgagee, after an assignment thereof by the latter, when made in good faith, without notice, actual or constructive, of the assignment, is valid. *Van Keuren* v. *Corkins*, 66 N. Y. (21 Sick.) 77.

§ 13. **Correcting, reforming, etc.** A mortgage, the release whereof is obtained by fraud, will be reinstated both as against the mortgagor and a purchaser from him with notice of the mortgage, if no new rights have intervened in favor of the purchaser since the release. *Ellis* v. *Lindley*, 37 Iowa, 334; *Stebbins* v. *Howell*, 4 Abb. (N. Y.) App. Dec. 297; 1 Keyes, 240. So, too, if the release is given through mistake (*Bruse* v. *Nelson*, 35 Iowa, 157); or the release be dependent upon a condition which had not been fulfilled. *Wood* v. *McClughan*, 4 T. & C. (N. Y.) 420. But when a mortgage has been once paid, and the lien discharged, the parties cannot restore the lien, to the prejudice of third persons who are their incumbrancers. *Angel* v. *Boner*, 38 Barb. 425. Yet a purchaser of real estate incumbered by a mortgage whose deed from the mortgagor was subject to the mortgage, which the said purchaser, by a clause in the deed, assumed and agreed to pay as part of the consideration, and who had, subsequently, actually paid the mortgage to the mortgagee, may, nevertheless, having taken an assignment thereof in blank at the time of payment, reissue such mortgage to his creditor in payment of a debt, by filling up the blank in the assignment with such creditor's name, so as to bind the lands in the hands of a subsequent purchaser from him with warranty. *Kellogg* v. *Ames*, 41 N. Y. (2 Hand) 259. In a late case where the complainant was induced to exchange with the defendant mortgages, in part for bonds, upon false and fraudulent representations of the defendant as to the value of the bonds which proved to be worthless, the defendant knowing at the time of the agreement for the exchange that the complainant would not make it without just such assurances as to their value as defendant made, and the mortgages being thereupon canceled and the defendant thus securing a title to the property upon which they were a lien, free from the incumbrance of the mortgages, it was held that the incumbrance of the mortgages should be reestablished. *Storer* v. *Wood*, 26 N. J. Eq. 417.

§ 14. **Cancellation.** When the debt is satisfied by the mortgagor, he is entitled to have the bond and mortgage delivered up to him and canceled. *Matter of Coster*, 2 Johns. Ch. 503; *Knox* v. *Johnston*, 26 Wis. 41. A mortgage is discharged by the payment of the debt, though the discharge is not entered upon the record. *McNair* v. *Picotte*, 33

Mo. 57; *Merrill* v. *Chase*, 3 Allen, 339; *Hatfield* v. *Reynolds*, 34 Barb. 612; *Perkins* v. *Sterne*, 23 Tex. 561. But the taking of a new note and mortgage, merely as collateral or additional security of a debt already secured by note and mortgage, does not operate as an extinguishment or satisfaction of the debt, evidenced by the old note and mortgage, unless superior equities have intervened. *Cissna* v. *Haines*, 18 Ind. 496; *Flower* v. *Elwood*, 66 Ill. 438. Nor does the surrender of a note secured by a mortgage and the taking of a new note for the balance due operate as a discharge of the lien. *Lippold* v. *Held*, 58 Mo. 213; *Swan* v. *Yaple*, 35 Iowa, 248. But a voluntary giving up and satisfaction of a mortgage, and taking the note of a third party in lieu thereof, is a relinquishment of the mortgage lien and a surrender of the mortgage. *Mattix* v. *Weand*, 19 Ind. 151. But if the mortgage is procured to be delivered up by the fraud of the mortgagor, it will be reinstated. *Grimes* v. *Kimball*, 3 Allen (Mass.), 518. Where the mortgagee purchases the mortgaged premises, and receives a deed in fee simple, paying a part of the consideration, by the delivery of the note which the mortgage was given to secure, to the maker, such mortgage is thereby paid off and extinguished, and has no effect either in law or in equity, although it may appear uncanceled on the record. *Jennings' Lessee* v. *Wood*, 20 Ohio, 261.

Equity will keep an incumbrance alive or consider it extinguished, as will best serve the ends of justice and the actual and just intent of the party. *Goulding* v. *Bunster*, 9 Wis. 513; *Champney* v. *Coope*, 32 N. Y. (5 Tiff.) 543; S. C., 34 Barb. 539. The right to the money secured by a mortgage being personal, either one of several mortgagees can receive the same and discharge the right to recover it of the mortgagor. *People* v. *Keyser*, 28 N. Y. (1 Tiff.) 226. The entering of a discharge of a mortgage by the mortgagee does not of itself discharge the debt, but the security only. *Sherwood* v. *Dunbar*, 6 Cal. 53. But any act which discharges a note secured by a mortgage discharges also the mortgage. *Sherman* v. *Sherman*, 3 Ind. 337; *Fisher* v. *Otis*, 3 Penn. (Wis.) 78.

A mortgage is not extinguished by the performance of an agreement by a mortgagor to pay the mortgagee a sum equal to the amount of his debt, if he would assign the mortgage to the mortgagor's attaching creditor as security instead of the attachment. The mortgage can be enforced by the creditor, although for a temporary purpose he had re-assigned it to the mortgagee, who afterward assigned it back again. *Sheddy* v. *Geran*, 113 Mass. 378. A mere stranger who voluntarily pays off a mortgage, but who fails to take an assignment, and allows the mortgage to be canceled and discharged, cannot afterward come

into equity, and, in the absence of fraud, accident or mistake, have the mortgage re-instated and himself substituted in the place of the mortgagee. *Guy* v. *Du Uprey*, 16 Cal. 195.

Satisfaction and discharge by payment of a mortgage, made and held as collateral security for the payment of a previous mortgage, is a payment upon the principal debt, for *prima facie* there is nothing else upon which the money paid could apply. *Prouty* v. *Eaton*, 41 Barb. 409. And the discharge of a mortgage of record, and the possession of the instrument, with the accompanying bond, canceled, by one not the mortgagor, but the owner of land charged with its payment, is *prima facie* evidence of the payment by such holder. *Braman* v. *Bingham*, 26 N. Y. (12 Smith) 483. A release of a mortgage, procured under a promise to pay, is inoperative until the mortgage debt is paid. *Hale* v. *Morgan*, 68 Ill. 244.

It will be presumed that a mortgage has been satisfied, or become barred by lapse of time, where the mortgagor and his assigns have held and enjoyed the mortgaged estate for more than seventy years, and no claim under the mortgage had been set up. *Atkinson* v. *Patterson*, 46 Vt. 750. But the mere recovery of a judgment on *sci. fa.* to foreclose a mortgage will not extinguish the relation of mortgagor and mortgagee, nor discharge either the note or mortgage. *Rockwell* v. *Servant*, 63 Ill. 424. The mortgage was discharged, where the owner thereof made an unwritten agreement with the mortgagor, to satisfy it if he would discharge a disputed claim of an estate, of which the mortgagor was sole beneficiary, by will, against a third person; and the latter, with approval of the executor of the estate, gave a receipt for the claim, and released the executor from, and indemnified him against all liabilities of the estate. *Griswold* v. *Griswold*, 7 Lans. (N. Y.) 72; 52 N. Y. (7 Sick.) 631. But a verbal agreement to release a mortgage, to be sustained, should be established beyond reasonable doubt, and where the evidence on such point is conflicting, the appellate court will not interfere with the judgment of the court below. *Stevenson* v. *Adams*, 50 Mo. 475. A court of equity may set aside the cancellation of a mortgage, upon satisfactory proof that it was procured by fraud or done by mistake. *Dudley* v. *Bergen*, 23 N. J. Eq. 397. And a judgment creditor may entertain proceedings to cancel a mortgage on the creditor's property. *Merrick* v. *McCausland*, 24 La. Ann. 256. And a receiver, authorized to execute upon payment formal satisfaction and discharge of mortgages in his hands as such officer, has authority to receive payment of the amount secured by, and to satisfy a mortgage, although the same be not due at the time. *Hermans* v. *Clarkson*, 64 N. Y. (19 Sick.) 171.

An agreement by a mortgagee to go into partnership with the mortgagor and to cancel a mortgage held on the premises where the business is to be carried on, as the mortgagee's share of the capital, if abandoned before the next payment of interest becomes due, does not amount to an agreement to extend the time of payment of the interest so as to save a forfeiture of credit incurred by the non-payment of interest. *Fausel* v. *Schabel*, 22 N. J. Eq. 126.

When a mortgage or deed of trust is duly recorded, the person whose property is incumbered thereby is entitled, upon fully paying and satisfying the debt, to secure which such mortgage or deed of trust was given, to have satisfaction of the same entered upon the margin of the record. And a mortgagee or trustee who fails or refuses, when duly requested, to enter up such satisfaction, or to execute a deed of release, is liable in damages to the party aggrieved. *Verges* v. *Giboney*, 47 Mo. 171; *Sherwood* v. *Wilson*, 2 Sweeny (N. Y.), 684. A mortgagee who has recovered costs on final decree, in a foreclosure suit to which he was a party defendant, cannot be required to cancel or release his mortgage until such costs are paid. *Lewis* v. *Conover*, 21 N. J. Eq. 230.

Where a vendor agreed that upon a mill of certain dimensions being built on a lot sold, he would accept policies of insurance on it for the amount of another mortgage collateral to one given on the property sold, and he did accept such policies, he cannot decline to enter satisfaction on such other mortgage, because the mill was not of the dimensions contracted for. *Swain* v. *Seamens*, 9 Wall. 254.

ARTICLE IV.

VALIDITY OF MORTGAGE.

Section 1. In general. A mortgage to secure the payment of a sum of money may be upheld, although there is connected with it no other obligation or contract of the mortgagor, or of any other person to pay the same. *Brookings* v. *White*, 49 Me. 479. And a mortgage to secure all existing debts, without specifying them, is not invalid for want of certainty in the amount secured. *Mich. Ins. Co.* v. *Brown*, 11 Mich. 265.

Though at law a mortgage cannot operate on property not in existence at the time the mortgage is executed, courts of equity will enforce specific execution of contracts, and give relief in numerous cases of agreements relating to lands and things in action, or to contingent interests or expectancies, upon the maxim that equity considers that done which, being agreed to be done, ought to be done. *Sillers* v. *Lester*, 48 Miss. 513; *Stevens* v. *Buffalo, etc., R. R. Co.*, 45 How. (N. Y.)

Pr. 104; *Pierce* v. *Milwaukee, etc., R. R. Co.*, 24 Wis. 551; 1 Am. Rep. 203; *Morrill* v. *Noyes*, 56 Me. 458. So, a mortgage upon an existing railroad may be extended to rolling stock to be subsequently acquired, if an intent to acquire such stock and to hold it subject to the mortgage is sufficiently expressed. *Morrill* v. *Noyes*, 56 Me. 458; *Weetjen* v. *St. Paul & Pacific R. R. Co.*, 4 Hun (N. Y.), 529; *Pierce* v. *Milwaukee, etc., R. R. Co.*, 24 Wis. 551; 1 Am. Rep. 203. A mortgage, given when the mortgagor has but an inchoate title, may become fully operative on maturity of the title. *Crompton* v. *Pratt*, 105 Mass. 255. But a mortgage executed on land acquired under the pre-emption laws of Congress, in accordance with an agreement made by the pre-emptor before such acquirement, is void, except in favor of a *bona fide* purchaser for value. *Woodbury* v. *Dorman*, 15 Minn. 338.

An instrument should be given the effect intended by the parties. So, a mortgage executed to the commissioner of a school fund, after the abolition of the office, but to secure a loan from that fund, will be sustained upon the ground that the mortgagor was estopped from denying the official character of the grantee. *Floyd Co.* v. *Morrison*, 40 Iowa, 188. So, too, where an execution of a power is defective through mistake, but the object sought by the execution has been obtained, equity will interfere to protect the party furnishing the consideration for which the power is executed from loss by reason of the defect. *Beatty* v. *Clark*, 20 Cal. 11. The validity of a mortgage, or the remedy upon it, is not affected by the fact that the remedy at law upon the note which accompanied the mortgage was barred by the statute of limitations. *Powell* v. *Smith*, 30 Mich. 451.

To avoid a mortgage alleged to be given to compound a felony, it should appear, 1st, that there was an agreement to compound a felony; 2d, that the mortgage was the result of that agreement, and 3d, that the mortgagee knew of the illegal consideration, at the time of taking the mortgages. *Earl* v. *Clute*, 2 Abb. (N. Y.) App. Dec. 1; 1 Keyes, 36.

Equity will not permit a cotemporaneous agreement, as to cut wood for timber, at pleasure, to be abused to the prejudice of the mortgage creditor. *Emmons* v. *Hinderer*, 24 N. J. Eq. 39. Possession to operate as notice should be inconsistent with the title. *Staples* v. *Fenton*, 5 Hun (N. Y.), 172. Where a deed is made to a married woman and "her body heirs," as the legal effect of the deed is to give her a life estate, and there is no restriction of alienation, it is competent for her, by uniting with her husband, to mortgage her estate and release her homestead, and such a mortgage creates a valid lien upon her interest in the land. *Hosmer* v. *Carter*, 68 Ill. 98.

Where a State officer, without authority of law, loans the money of the State, taking a mortgage on real property to secure the money loaned, the mortgagor cannot deny the validity of the mortgage; neither can his grantees. *State* v. *Shaw*, 28 Iowa, 67.

A mortgage, given by a pre-emptor upon the land pre-empted before the entry, is void, as forbidden by section 13 of the act of congress of Sept. 4, 1841. *Brewster* v. *Madden*, 15 Kan. 249.

Where one cultivates a farm under a contract that he is to receive one-half of the crops, after deducting from his half all advances made by the owner in furtherance of its cultivation, he has no interest or share in the crop upon which he may give a mortgage lien to third persons, except what remains of the one-half after paying advances made by the owner. *McGee* v. *Fitzer*, 37 Tex. 27.

A mortgage, made during the civil war, in the State of Alabama, is valid and enforceable in the courts of that State acting under the constitution and laws of the United States, notwithstanding it may have been based upon a loan of confederate treasury notes. *Scheible* v. *Bacho*, 41 Ala. 423.

A mortgage of the equitable title, made by the vendee in possession under a contract of purchase, and recorded, has as full force and effect against a subsequent mortgagee as it has against the original vendor. *Philly* v. *Sanders*, 11 Ohio (N. S.), 490.

§ 2. **Defects in execution.** An unacknowledged mortgage is a valid security in the hands of a mortgagee, except as against *bona fide* purchasers or incumbrancers without notice. *Vickery* v. *Dickson*, 62 Barb. 272; *Haskill* v. *Sevier*, 25 Ark. 152; *Moore* v. *Thomas*, 1 Oreg. 201. But a *feme covert* mortgagor must acknowledge or the mortgage will not be good even between the parties. *Perdue* v. *Aldridge*, 19 Ind. 290. Though a mortgage subscribed by but one witness, where the statute requires two, may be upheld and enforced in chancery. *Moore* v. *Thomas*, 1 Oreg. 201.

A mortgage, like any other deed, to be valid and operative, must not only be signed and sealed, but it must be delivered by the maker and accepted by the mortgagee, or by some one legally acting for him. *Freeman* v. *Peay*, 23 Ark. 439. But a deed of trust given to secure a note for money loaned is valid, even though the note was never in fact delivered by the borrower to the lender, if the indebtedness existed for which the note was to have been given. *Eacho* v. *Cosby*, 26 Gratt. (Va.) 112.

A mortgage given to secure the payment of borrowed money, and dated on a secular day of the week, may be enforced, in Missouri,

though the note was made and executed and the money was borrowed on Sunday. *Gwinn* v. *Simes*, 61 Mo. 335.

A mortgage in which the name of the mortgagee is left blank, but otherwise correct, delivered to one as collateral security for a loan, is of no validity and effect, and is not admissible as evidence of the debt. *Chauncey* v. *Arnold*, 24 N. Y. (10 Smith) 330.

§ 3. **Defective description.** A mortgage is not invalid, as to third persons, on account of uncertainty in the description of the debt intended to be secured, when, upon the ordinary principle allowing extrinsic evidence to apply a written contract to its proper subject-matter, the debt intended to be secured may be shown, as between the parties. *Gill* v. *Pinney*, 12 Ohio (N. S.), 38; *Sheafe* v. *Gerry*, 18 N. H. 245.

A mortgage of lands, described as parts of different sections, without stating the township or range, is void for uncertainty. *Boyd* v. *Ellis*, 11 Iowa (3 With.), 97. It is void also if it do not state in what county or State the land is situated, or at what particular land office it is subject to entry. *Cochran* v. *Utt*, 42 Ind. 267. A description by a known meridian will prevail over that by a county. *Sickmon* v. *Wood*, 69 Ill. 329.

The unintentional misstatement in a mortgage of the number of the city lot on which it is given, does not invalidate it between the parties, or as to subsequent incumbrancers with notice of the misstatement. *Mervin* v. *Murphy*, 35 Tex. 787. But where, by mutual mistake of the parties to a mortgage, the description of the property intended to be covered by the instrument contained the clause, "being the same premises described in a deed from Alpheus G. Fuller to Holmes Amidon, dated," etc., "and recorded," etc.; and the premises described in said deed from Fuller to Amidon were not the premises intended to be mortgaged, the record of the mortgage is not notice to a subsequent purchaser of what was intended to be conveyed by the mortgage. *Simmons* v. *Fuller*, 17 Minn. 485.

Where the description in a mortgage states two east and west lines, to run at "nearly right angles" to a certain section line, it merely implies that the east and west lines of the section do not run due north and south; and there is no uncertainty in the description which would render the mortgage void. *Teetshorn* v. *Hull*, 30 Wis. 162.

An act of mortgage declaring the object mortgaged to be the mortgagor's entire interest in a parish named, giving the number of acres, and mentioning the river near which it lies, and by which it is bounded, with a reference to certain titles of the mortgagor to be found in the office of the recorder of mortgages for the parish, sufficiently describes the property. *National Bank* v. *Barrow*, 27 La. Ann. 396.

Where the description of the granted premises in a mortgage is imperfect, but authority is given in the mortgage to the recorder to insert the portion omitted, when obtained, this authority is equivalent to a power of attorney to the recorder to make such addition, and a subsequent incumbrancer cannot object that the recorder executed the authority conferred upon him. *Harshey* v. *Blackmarr*, 20 Iowa, 161.

§ 4. **Contrary to statutes or public policy.** Where an original bargain is contrary to the policy of the law, a deed in the nature of a mortgage, to secure its performance, will not be enforced in a court of equity. *Gilbert* v. *Holmes*, 64 Ill. 548.

§ 5. **Capacity to mortgage.** A lessee of premises who puts a dwelling-house thereon by permission of the owner of the fee, and with the right to move off the house at the expiration of the lease if the lessee complies with the lease, has such an interest in the realty, as he may convey by mortgage. *Hagar* v. *Brainerd*, 44 Vt. 294. So, a person who erects improvements on real estate, under a parol contract for its purchase, thereby acquires an interest in the land to the extent of such improvements; and this interest may be mortgaged. *White* v. *Butt*, 32 Iowa, 336.

A married woman, in Indiana, may bind herself by her mortgage to keep the mortgaged premises free from legal taxes and charges. *Jones* v. *Schulmeyer*, 39 Ind. 119.

§ 6. **Consideration.** The validity of a deed of mortgage depends on the genuineness of the debt which the mortgage is given to secure, and not upon the description of the debt contained in the deed, nor upon the form of indebtedness, whether by note or otherwise. *Hodgdon* v. *Shannon*, 44 N. H. 572. So, where a mortgage described the mortgage debt as a note of $1,000 when no such note had ever been given, but the mortgagor was indebted to the mortgagee for goods sold to the amount of $756, and the latter had agreed to furnish additional goods up to the sum of $1,000, and the mortgagor had offered to give him security for the whole, and made this mortgage for that purpose, the mortgage was held void as against a subsequent attaching creditor. *Bramhall* v. *Flood*, 41 Conn. 68.

If the consideration of a mortgage is made up of several distinct transactions, some of which are illegal, and that part of the consideration which is legal can be separated, with ease and certainty, from the illegal, the mortgage is valid for that part of the consideration free from illegality. *Feldman* v. *Gamble*, 26 N. J. Eq. 494. The indorsement of a note by one not a party thereto, and the execution of a mortgage by him to secure the note, must have a new consideration, if the indorsement is made and the mortgage executed after the mak-

ing of the note; but, if they are cotemporaneous with the making of the note, the consideration for the note is sufficient. *Davidson* v. *King*, 51 Ind. 224.

If a member of a copartnership gives a mortgage to a *bona fide* mortgagee, to secure his individual debt, upon lands purchased with partnership money, and for partnership purposes, but deeded to the partners, as individuals, the mortgage will be protected in equity, and will have a priority even over the creditors of the firm. *Hiscock* v. *Phelps*, 49 N. Y. (4 Sick.) 97; *Mingus* v. *Condit*, 23 N. J. Eq. 313. Otherwise, if the mortgage is given to secure an antecedent debt, and the mortgagee parts with no value, in reliance upon its security, or if he takes the mortgage with notice of the facts. In such case he takes the mortgage subject to all equities superior to his own, of any person or persons interested in the lands. *Lewis* v. *Anderson*, 20 Ohio St. 281; *Hiscock* v. *Phelps*, 49 N. Y. (4 Sick.) 97; *Mingus* v. *Condit*, 23 N. J. Eq. 313.

Where the rights of creditors do not interfere, a father may make a voluntary provision for his child, and a mortgage to a trustee for this purpose is deemed an executed contract, which is as valid, against his heirs, as a transfer for full pecuniary consideration would be. *Bucklin* v. *Bucklin*, 1 Abb. (N. Y.) App. Dec. 242; 1 Keyes, 141. Where a mortgage purports on its face to have been executed to secure the payment of ten thousand dollars, according to the condition of a certain bond, and it appears that no such bond was ever executed, that fact is not of itself fatal to the claims of the mortgagee, and parol proof may be received to sustain the mortgage. *Baldwin* v. *Raplee*, 4 Ben. 433.

A mortgage given to secure a note which was in fact made in consideration of Confederate notes cannot be enforced. *Seuzeneau* v. *Saloy*, 21 La. Ann. 305. And a mortgage given by an heir on her individual property to secure her one-fifth part of an annuity created by her father for the purchase of a lot of slaves, of which she inherited the one-fifth, is accessory to the principal obligation — the price of slaves — and cannot be enforced. *Lefevre* v. *Haydel*, 21 La. Ann. 663.

A mortgage may be given to indemnify the mortgagee for becoming surety or indorser. His liability forms a sufficient consideration. And such mortgage will be valid as against subsequent purchasers or incumbrancers. *Uhler* v. *Semple*, 20 N. J. Eq. (5 C. E. Green) 288.

A mortgage given without consideration, for the purpose of having it sold by the mortgagee to raise money for the mortgagor, is not available against subsequent lien-creditors from its date, but only from

the time money was advanced upon it, and accordingly, an assignee, having notice that it was so without consideration, is put upon inquiry as to whether there were liens intervening between its date and his purchase. *Mullison's Estate*, 68 Penn. St. 212.

For a particular case in which a mortgage for a fixed sum, and payable absolutely, was held invalid for want of consideration, see *Fisher* v. *Meister*, 24 Mich. 447.

Where a wife joins her husband in making a voluntary conveyance of her own lands to a third party for the purpose of defrauding the creditors of her husband, though it could not have that effect because he had no interest therein, and such third party exacts as a condition of reconveying the property to her, that a mortgage shall be given him on the lands of the husband, such reconveyance furnishes a sufficient consideration to uphold the mortgage. *Mapes* v. *Snyder*, 59 N. Y. (14 Sick.) 450. And a mortgage given by a married woman on her separate property, in payment of a note given by her husband for money borrowed for use and used by him in improving such separate property, upon an agreement to discharge such note, is founded upon a good consideration. *Caryl* v. *Williams*, 7 Lans. (N. Y.) 416.

A mortgage given by the owner of premises to a contractor for erecting buildings thereon, at a time when nothing was due him by the terms of the contract, but with the understanding that it should be assigned to parties who had filed a lien on the buildings for materials furnished, on their discharging their lien, and which was so assigned, and the lien thereupon discharged, is founded on a good consideration. *Haden* v. *Buddensick*, 4 Hun, 649.

§ 7. **Fraud, mistake, misrepresentation.** A mortgage given as part consideration for a sale, at the instance and for the benefit of the vendee, is not rendered void by fraud in the sale, but is merely voidable at his election; and where he has placed himself in such a position that he cannot rescind, though retaining his remedy for damages, the mortgage will remain operative. *Pullman* v. *Alley*, 53 N. Y. (8 Sick.) 637.

The exaction of usurious interest does not invalidate the mortgage given to secure the payment of the debt, nor impair the right of the mortgagee to sell the mortgaged premises under a power in the mortgage. The court will, in distributing the proceeds, adjust the question of interest. *Powell* v. *Hopkins*, 38 Md. 1. And although a party has certified that a mortgage made by him is good and valid, he may defend a foreclosure suit brought by the purchaser, on the ground that the mortgage was usurious, if the purchaser did not believe the certificate. *Eitel* v. *Bracken*, 38 N. Y. Superior Ct. 7. That a sale made under authority of a deed of trust was postponed three

years raises no presumption of fraud which will avoid it, when no possession of the land conveyed, nor other benefit, is reserved to the grantor. *Starke* v. *Etheridge*, 71 N. C. 240. Nor is the mere fact that the mortgage recites a greater indebtedness than actually exists at the time of its execution conclusive evidence of fraud. That must be determined from all the circumstances. And where a chattel mortgage duly recorded describes the property as "twenty two-year old steers on the same farm," parol proof is admissible to identify the particular cattle, the record being notice to all subsequent purchasers that the mortgagee had some claim of right to cattle upon the farm. *Bell* v. *Prewitt*, 62 Ill. 361.

One who, without notice of a lien, takes a mortgage to secure a prior indebtedness due him by the mortgagor, and by the mortgage extends the time of payment, is a *bona fide* incumbrancer for value, and takes free of an equitable lien. *Hale* v. *Omaha Nat. Bank*, 39 N. Y. Superior Ct. 207; 64 N. Y. (19 Sick.) 550. A vendor of real estate, in order to defeat a mortgagee of his vendee on the ground of fraud in the sale of the property, must show that the mortgagee was aware of the fraud at the time the contract of mortgage was made. *Makler* v. *McClelland*, 21 La. Ann. 579.

Where a mortgage is impeached for fraud, in that the execution of it was obtained through false and deceitful representations, the mortgagee may prove that the mortgagors executed the same of their own accord, and without solicitation on his, the mortgagee's part, as facts and circumstances disproving the allegations of fraud. *Blackwell* v. *Cummings*, 68 N. C. 121.

A note and a mortgage securing the price of property sold through the vendor's fraudulent misrepresentations as to its value are not void. *Sanborn* v. *Osgood*, 16 N. H. 112.

Where one in good faith and without fraud takes a mortgage from a husband and wife to secure a just debt, the court will hesitate long to set it aside, even on proof that the husband procured her execution thereof by fraudulent representations, and that she used due diligence to ascertain its contents. *Spurgin* v. *Traub*, 65 Ill. 170. And where a wife had joined her husband in conveying several parcels of her real estate, and had permitted him to receive and keep the proceeds, and afterward, at his request, joined in conveying another parcel, but upon condition of his making provision for their daughter, to whom a note and mortgage was then given of larger amount than that received for the parcel last conveyed, in the absence of any fraud the mortgage was valid. *Brooks* v. *Dalrymple*, 12 Allen (Mass.), 102.

§ 8. **Fraudulent as to creditors.** Creditors of a mortgagor cannot

defeat a mortgage given to secure one of his creditors, simply on the ground that the mortgage was executed without the knowledge of the mortgagee. His assent will be presumed. *Ensworth* v. *King*, 50 Mo. 477. Nor can they avoid a mortgage given to pay first claims against the mortgagor, on the ground that it was made with the intent to hinder and delay creditors, unless it appear that both the mortgagor and the mortgagee participated in the fraudulent intent. *Herkelrath* v. *Stookey*, 63 Ill. 486. And where the rights of creditors do not interfere, a father may make a voluntary provision for his child; and a mortgage to a trustee for this purpose is deemed an executed contract, which is as valid against his heirs, as a transfer for full pecuniary consideration would be. *Bucklin* v. *Bucklin*, 1 Abb. (N. Y.) App. Dec. 242; 1 Keyes, 141.

Where an indorsement on the back of a mortgage to the effect that it shall cover property acquired after its execution is made, for the purpose of defrauding creditors, such indorsement is void, but does affect the validity of the mortgage. *Whited* v. *Pillsbury*, 13 Bankr. Reg. 241.

A mortgage deed of real estate is not to be deemed fraudulent, solely because the note secured covers the amount of a debt for which the mortgagee is liable, nor because its true character, as a liability, and not a debt, is not stated. *Prescott* v. *Hayes*, 43 N. H. 593.

§ 9. **Provision as to foreclosure, interest, costs, etc.** An agreement in a mortgage that it "shall commence to foreclose the day after each note becomes due, provided any one remains unpaid, and shall be foreclosed at the end of three years from said next day," is wholly ineffectual. *Chase* v. *McLellan*, 49 Me. 375. And a stipulation in a mortgage, by which a mortgagor's equity of redemption is to be cut off upon failure to perform the condition by a certain particular time, is void. *Quartermous* v. *Kennedy*, 29 Ark. 544.

A stipulation in a mortgage that upon default of payment of any installments of the principal as therein provided, or the annually accruing interest, the whole sum to become due and payable, and payment to be enforced as thereinafter provided, is a legal and valid stipulation and not in the nature of a penalty or forfeiture. *Mobray* v. *Leckie*, 42 Md. 474; *Valentine* v. *Van Wagner*, 37 Barb. 60. *Ante*, Vol. 3, 414.

Where a mortgage provides in express terms that in case of default in payment the mortgagor shall "pay all costs of collection of said sum of money" and also all "attorney's fees," a reasonable amount can be recovered for attorney's fees although such amount does not rest in computation, but must be ascertained by evidence *aliunde*.

Clawson v. *Munson*, 55 Ill. 394; *Tholen* v. *Duffy*, 7 Kans. 405; *Williams* v. *Meeker*, 29 Iowa, 292. And a stipulation in a mortgage note that the mortgagee shall be allowed a percentage on the amount of the debt for the expenses of collection, if obliged to bring suit, is valid, if the sum allowed is reasonable. *McLane* v. *Abrams*, 2 Nev. 199. If it is stipulated that a reasonable amount shall be allowed as attorney's fees, a reasonable fee may be recovered as part of the costs, without any averment in the petition as to what amount is a reasonable fee. *Nelson* v. *Everett*, 29 Iowa, 184. So, a stipulation in a mortgage to pay ten per cent attorney's fees on foreclosure, where the mortgage debt is under $4,000, is valid, and the amount of the fee not so excessive that a court of equity will refuse to enforce the stipulation therefor. And the taxes paid by the mortgagee and stipulated attorney's fees, when included in the judgment, draw the same rate of interest as the judgment. *Sharp* v. *Barker*, 11 Kan. 381.

Where a mortgage is made to secure the payment of a series of notes, it is competent for the mortgagor to agree to pay attorney's fees, and that on failure to pay one of the notes, all the notes shall become due and payable. *Jones* v. *Schulmeyer*, 39 Ind. 119.

A covenant in a mortgage that the mortgagor will pay, in addition to the mortgage debt, all counsel fees and costs which the mortgagee may incur in collecting the same, is not within the prohibition of a statute limiting the lien of a mortgage to the principal sum expressed on the face thereof. *Maus* v. *McKellip*, 38 Md. 231.

Where two persons buy property together, and one furnishes all the money, and the other, to secure him for one-half the money, mortgages other property, and the two then agree in writing, that the mortgage is given for money advanced in the purchase, and that in the settlement of accounts the mortgagor shall be allowed a reasonable compensation for the services which he may render as attorney in perfecting the title of the property purchased, the value of such services rendered may be proved for the purpose of reducing the amount due on the mortgage. *Whitmore* v. *Reynolds*, 46 Cal. 380. But where a mortgage stipulates that in case of foreclosure a certain sum shall be paid by the mortgagor as liquidated damages, the stipulation is void. *Foote* v. *Sprague*, 13 Kan. 155.

A stipulation in a mortgage, that upon the non-payment of taxes due upon the premises, the debt secured by the mortgage should become due, is valid. *Stanclifts* v. *Norton*, 11 Kan. 218. And a stipulation for insurance for the mortgagee's benefit, being intended to afford security supplementary to and connected with the mortgage, and to keep the mortgaged property itself so far intact as a means of security

as to perpetuate the safety of the mortgagee's interest in case the buildings should burn, is in equity a sort of adjunct to the mortgage, and is binding on the mortgagor and all others in his shoes, with notice. *Miller* v. *Aldrich*, 31 Mich. 408.

§ 10. **Validity in part.** A mortgage, given for a larger sum than is due to the mortgagee, is valid for the excess only in case no rights of third persons have intervened. As against a subsequent *bona fide* mortgagee, such a mortgage can only be a valid security for the amount due thereon at the time his rights as subsequent mortgagee accrued. *Bissell* v. *Kellogg*, 60 Barb. 617; 65 N. Y. (20 Sick.) 432. So, a mortgage given for moneys advanced, and lands to be conveyed, can only be enforced by the mortgagee to the amount of money advanced, when he has wrongfully refused to convey the land. *Robinson* v. *Cromelein*, 15 Mich. 316.

If a creditor agree to remit part of a debt on the debtor's giving him, for the balance, a mortgage with a proviso, that if the mortgage debt were not paid within two years the whole of the original debt should be recovered, the proviso is a penalty against which equity will relieve, and the mortgagee can recover only for the smaller sum. *Thompson* v. *Hudson*, L. R., 2 Eq. 612.

A parol agreement, that a mortgage to secure a sum certain then advanced shall also bind the land for further advances, is void, as between the parties or their grantees with notice. *Stoddard* v. *Hart*, 23 N. Y. (9 Smith) 556.

ARTICLE V.

RIGHTS AND LIABILITIES OF PARTIES.

Section 1. Of mortgagor. The interest of the mortgagor in the mortgaged estate is much more simple and better defined than that of the mortgagee. And according to the weight of American authorities, his interest in the lands is an estate of inheritance, which is in no way affected by the mortgage before entry and foreclosure, further than by the lien created. *White* v. *Rittenmyer*, 30 Iowa, 268; *Kortright* v. *Cady*, 21 N. Y. (7 Smith) 343. Although a mortgage is in form a conveyance in fee upon condition, yet, in effect it is, even after condition broken, merely a security for the debt. As such it is extinguished and the title revests, whenever the debt is paid. *Pease* v. *Pilot Knob Iron Co.*, 49 Mo. 124; *Miner* v. *Beekman*, 42 How. (N. Y.) Pr. 36; S. C., 11 Abb. (N. Y.) Pr. 147; *Hemphill* v. *Ross*, 66 N. C. 477; *Savage* v. *Dooley*, 28 Conn. 411. The mortgagor remains the real owner of the land, and entitled to the possession after, as before, the breach of the condition of defeasance, and the mortgagee cannot

maintain an action of trespass to try title to dispossess him. *Mann's Ex'r* v. *Falcon*, 25 Tex. 271. He has an actual estate in the mortgaged premises which he may devise or grant, though he holds possession and receives the profits at the will of the mortgagee who may evict him without notice. *White* v. *Whitney*, 3 Mete. 81; *Buchanan* v. *Munroe*, 22 Tex. 537.

The legal title of the mortgagor to the mortgaged premises is not affected by default in payment to, or the taking of possession by the mortgagee. *Trimm* v. *Marsh*, 54 N. Y. (9 Sick.) 599; 13 Am. Rep. 623; *Mann's Ex'r* v. *Falcon*, 25 Tex. 271. His equity of redemption is not merely an equitable estate, and it is subject to levy and sale on execution. *Gorham* v. *Arnold*, 22 Mich. 247; *Bradley* v. *Fuller*, 23 Pick. 1; *Cooper* v. *Davis*, 15 Conn. 556. His interest may be sold on execution although he is out of possession, and the mortgagee in possession may procure such sale, and become the purchaser, and can set up the title acquired by sheriff's deed as a defense in an action to redeem. *Trimm* v. *Marsh*, 54 N. Y. (9 Sick.) 599; 13 Am. Rep. 623. The mortgagor in possession is deemed the owner of land so far as notice is necessary to be given to the owner of the intended location of a highway across it (*Parish* v. *Gilmanton*, 11 N. H. 293); or notice to repair the street in front of the mortgaged premises (*Norwich* v. *Hubbard*, 22 Conn. 587); or of a petition to enforce a mechanic's lien upon it. *Howard* v. *Robinson*, 5 Cush. 119. See *Wright* v. *Tukey*, id. 290.

The general rule is, that the mortgagor, until some action, or until the mortgagee shall have obtained actual possession of the mortgaged premises, cannot be charged with the rents and profits thereof, even though the premises are an inadequate security for the debt, and this extends to a grantee of the mortgagor, and includes rent accruing after the commencement of process to obtain possession. *Fitchburg Co.* v. *Melven*, 15 Mass. 268; *Clarke* v. *Curtis*, 1 Gratt. 289; *Hughes* v. *Edwards*, 9 Wheat. 489; *Syracuse City Bank* v. *Tallman*, 31 Barb. 201; *Mississippi Valley, etc., Railway Co.* v. *U. S. Express Co.*, 81 Ill. 534. The mortgagor, until actual foreclosure, is in possession by right, and not by sufferance, and may make such arrangements for the use of the property as any other person could during his term. *Ludue* v. *Detroit R. R. Co.*, 13 Mich. 380; *Hughes* v. *Edwards*, 9 Wheat. 489.

Between the mortgagor and the mortgagee, so long as the latter does not treat the former as a trespasser, the possession of the mortgagor is not hostile to or inconsistent with the mortgagee's right; and to this extent the possession of the mortgagor is the possession of the mortgagee.

Doe v. *Barton*, 11 A. & E. 307; *Smartle* v. *Williams*, 1 Salk. 245; *Nichols* v. *Reynolds*, 1 R. I. 30; *Boyd* v. *Beck*, 29 Ala. 703. But there cannot be a mixed possession by a mortgagor and a mortgagee as tenants in common, after condition broken, so that the law would adjudge the possession to the latter. *Doe d. Hall* v. *Tunnell*, 1 Houst. (Del.) 320. If one of two tenants in common mortgage his share to his co-tenant, he cannot have partition against him, since in respect to his co-tenant he has not sufficient seizin to maintain partition against his own mortgagee. *Bradley* v. *Fuller*, 23 Pick. 1. And the owner of land, by mortgaging an undivided half thereof and allowing the mortgagee to enter to foreclose before condition broken, does not thereby become tenant in common with him; and a judgment creditor of such a mortgagor cannot, by levying an execution on the land, maintain against the mortgagee a petition for partition. *Norcross* v. *Norcross*, 105 Mass. 265.

Notwithstanding the general rule that the mortgagor, until some action by the mortgagee, is entitled to the earnings and profits of the mortgaged property, it is competent for the parties to agree in the mortgage that such future earnings and profits shall be held in equity by the mortgagee; and under such a contract, such income whenever received is operated upon by the mortgage, and the party receiving it holds it in trust for whoever in equity is entitled to it. *Pullan* v. *Cincinnati, etc., R. R. Co.*, 5 Biss. 237; *Walthall's Executors* v. *Rives*, 34 Ala. 96.

A mortgagor in possession of the farm after condition broken may cut firewood and timber for repairs, for use upon the premises, and for other ordinary purposes, according to the well-known and existing uses of good husbandry. *Hapgood* v. *Blood*, 11 Gray (Mass.), 400. And in any case of a mortgage of timber land, where the amount due according to the stipulation of the mortgage is paid, the lien of the mortgage upon the timber which may have been cut down, and so severed from the realty, is discharged, and the timber reverts to the mortgagor or any vendee of his. *Hutchins* v. *King*, 1 Wall. (U. S.) 53.

In most of the States the mortgagor is remitted to his legal rights as soon as he shall have paid the debt, and he may recover possession of the mortgaged premises in an action against the mortgagee. *Jackson* v. *Davis*, 18 Johns. 7; *Den* v. *DeHart*, 1 Halst. 456; *Morgan* v. *Davis*, 2 Har. & McH. 9. But in Massachusetts, Maine and some other States his remedy is only in equity. He cannot maintain an action at common law against the mortgagee to recover the possession.

Parsons v. *Welles*, 17 Mass. 419; *Wilson* v. *Ring*, 40 Me. 116; *W. E. Jewelry Co.* v. *Merriam*, 2 Allen, 390.

A mortgagor cannot sue in the mortgagee's name, against the latter's will, upon a covenant to repair made by his tenant, with the mortgagee, who was in possession after condition broken, as a court of law cannot consider the covenant as made for the mortgagor's benefit; his right to damages being an incident of his right to redeem, and not enforceable at law, after breach of condition. *Seaver* v. *Durant*, 39 Vt. 103.

Where one who has no title to lands executes a mortgage thereon with covenants of seizin and of title, and he afterward acquires title, it inures to the benefit of the mortgagee, and the mortgagor and his privies in estate, in blood and in law, are estopped from questioning that, at the date of the mortgage, the mortgagor had title. A record, therefore, of the mortgage, prior to the acquisition of title by the mortgagor, is constructive notice to a subsequent purchaser in good faith. *Tefft* v. *Munson*, 57 N. Y. (12 Sick.) 97. Where a mortgage of school lands, by one who held merely a certificate of sale thereof, was cut off as to a portion of the lands, by a subsequent sale of such portion by the State, for the non-payment of interest, and the mortgagor afterward acquired the title from the purchaser at such sale, the lien of the mortgage does not re-attach; and parties, who had taken title to the other lands covered by the mortgage under a covenant to pay the mortgage debt, have no equity, to have such portion of the land charged with a part of the debt. *Weber* v. *Zeimet*, 30 Wis. 283.

A mortgage, though without the word "appurtenances" or its equivalent, covering land on which there is a mill worked by water power, brought by a water-course over adjoining lands, passes the mortgagor's right in the mill and water power. *Babcock* v. *Utter*, 1 Abb. (N. Y.) App. Dec. 27; 1 Keyes, 115.

Expenditures for improvements made by the mortgagor upon mortgaged premises, subsequent to the mortgage, have no lien prior to that of the mortgage. *Martin* v. *Beatty*, 54 Ill. 100. And the mortgagor of land, of which the mortgagee is in possession for the purpose of foreclosure, cannot maintain an action of tort against a stranger for using it as a way. *Sparhawk* v. *Bagg*, 82 Mass. (16 Gray) 583.

A tenant by the curtesy, who has mortgaged his estate, cannot retain the possession, as against the mortgagee, by showing that, when his curtesy ceases, the heirs of his deceased wife may perhaps be entitled to the land. *Allen* v. *Ranson*, 44 Mo. 263.

§ 2. **Wife or widow of mortgagor.** The wife of a mortgagor need not join in the execution of a purchase-money mortgage. And if she

do join, the husband may agree to pay a higher rate of interest in consideration of an extension of time; and the mortgage may be foreclosed against both, for interest accrued at such increased rate, and a personal judgment taken against him for any deficiency in the same action. *Thompson* v. *Lyman*, 28 Wis. 266; *Stow* v. *Tifft*, 15 Johns. 458; *Holbrook* v. *Finney*, 4 Mass. 566; *Bullard* v. *Bowers*, 10 N. H. 500. See, too, *Fletcher* v. *Holmes*, 32 Ind. 497. And it would make no difference that the mortgage embraced other lands with that which the mortgagor has purchased of the mortgagee. *Moore* v. *Rollins*, 45 Me. 493. But in these cases the seizin of the husband gives the wife a right of dower, as against everybody but the mortgagee and his assigns, so that if the mortgage be discharged by the husband in his life-time, or by his executor or administrator, she may be endowed as if it had never existed. *Bullard* v. *Bowers*, 10 N. H. 500; *Klinck* v. *Keckley*, 2 Hill's Ch. 250; *Brown* v. *Lapham*, 3 Cush. 551. Or if it be undischarged she may come in and avail herself of a right to redeem the estate from the mortgage. *Young* v. *Tarbell*, 37 Me. 509; *Mills* v. *Van Voorhis*, 23 Barb. 125, 133.

Where the legal estate in lands is vested in trustees to convey to the husband at a particular time, which was during or prior to the coverture, the wife should have dower in the estate, upon the principle that in equity, what the law requires to be done is regarded as if it were done, and as the conveyance ought to have been made in the husband's life-time, it should be treated as if it had been made. *Banks* v. *Sutton*, 2 P. Wms. 715; *Otway* v. *Hudson*, 2 Vern. 583. And the same rule would apply if the husband, by the terms of the trust, had a right to have the estate conveyed to him at any time he chose. *Yeo* v. *Mercereau*, 3 Harris (N. J.), 387. But if this right to have a conveyance made was the result of contract only, between the vendor and the purchaser, and to be made on the husband's request, it would not give the purchaser's wife a right to dower, if no such request had been made in his life-time. *Spangler* v. *Stanler*, 1 Md. Ch. Dec. 36.

Where a mortgagor conveys the equity of redemption absolutely to the mortgagee in satisfaction of the mortgage, no right of dower will attach in the wife of the grantee of the mortgagor. *Decker* v. *Hall*, 1 Edm. (N. Y.) Sel. Cas. 279. And no secret equity of the wife, however strong it may be against the estate of the husband, can avail against a mortgagee without notice. *Brown* v. *Richards*, 2 C. E. Green (N. J.), 32. The wife of a mortgagor, receiving a conveyance of his equity of redemption, by his procurement, from his assignees in insolvency, without objection on the part of creditors, is subject to the same

equities as he would have been in a suit to redeem the mortgage. *Stone* v. *Lane*, 10 Allen (Mass.), 74.

Where the mortgagor's wife is a party to the mortgage, her right and interest in the land will be defeated by a foreclosure sale, and she will have no interest in the residue of the money after the discharge of the mortgage debt, at least as against the creditors of her husband. *Dean* v. *Phillips*, 17 Ind. 406; *Frost* v. *Peacock*, 4 Edw. Ch. 678; *Reed* v. *Morrison*, 12 S. & R. 18; *Stow* v. *Tifft*, 15 Johns. 458.

§ 3. **Joint mortgagors.** Where tenants in common of land have mortgaged it for their joint debt, either of them, on paying the same before a sale, has a claim against his co-tenant for contribution. *McLaughlin* v. *Curts*, 27 Wis. 644. And if two several owners of distinct parcels mortgage them to secure a joint debt, it *prima facie* charges these lands, so far as respects the mortgagors, equally each for a moiety of the debt, and no agreement otherwise between the mortgagors will affect a subsequent purchaser without notice. *Hoyt* v. *Doughty*, 4 Sandf. 462.

§ 4. **Of mortgagee.** It is impossible to lay down any general rules as to the rights and remedies of mortgagees, which are not liable to be modified, in their application, by the circumstances of the particular cases as they arise, growing out of local laws and the subjects-matter to which they relate. Washb. Real Prop., Vol. 1, p. 553. By the common law, a mortgagee in fee of land is considered as absolutely entitled to the estate, which he may devise or transmit by descent to his heirs. *Demarest* v. *Wynkoop*, 3 Johns. Ch. 145; *Redman* v. *Sanders*, 2 Dana, 68; *Fisk* v. *Fisk*, Prec. Chan. 11. In equity, a mortgage, especially before condition broken, is regarded as creating an interest in the mortgaged premises of a personal nature, like that which the mortgagee has in the debt itself. It treats the debt as the principal thing and the land as a mere incident to it. Whatever it does with the land is auxiliary to enforcing payment of the debt. *Matthews* v. *Wallwyn*, 4 Ves. 118; *Hughes* v. *Edwards*, 9 Wheat. 500; *Runyan* v. *Mersereau*, 11 Johns. 534; *Anderson* v. *Baumgartner*, 27 Mo. 80; *Eaton* v. *Whiting*, 3 Pick. 484.

The common-law rule, as modified by the equitable principles, which now indeed have become part of the rule, still prevails in England. There the courts still hold that the legal title passes to the mortgagee, and becomes by default absolutely vested in him at law, and that the mortgagor has, after default, nothing but an equity of redemption to be enforced in a court of equity. After default the mortgagor can again become reinvested with the title to his land only by a reconveyance by the mortgagee. The same rule prevails in the New England

States, and in some of the other States of the Union, See *Stewart* v. *Barrow*, 7 Bush (Ky.), 368; *Johnson* v. *Houston*, 47 Mo. 227. In New York State and in other States the mortgagor has, both in law and equity, been regarded as the owner of the fee, and the mortgage has been regarded as a mere chose in action, a mere security of a personal nature. *Trimm* v. *Marsh*, 54 N. Y. (9 Sick.) 604; 13 Am. Rep. 623; affirming S. C., 3 Lans. 509; *Fletcher* v. *Holmes*, 32 Ind. 497; *Williams* v. *Beard*, 1 S. C. 309; *Mack* v. *Wetzlar*, 39 Cal. 247.

Courts of law now recognize the doctrine of equity, that a mortgagor while in possession is regarded as the true owner of the property mortgaged, and that the mortgage is only a security. *Carpenter* v. *Bowen*, 42 Miss. 28; *Woods* v. *Hilderbrand*, 46 Mo. 284; 2 Am. Rep. 513; *Newport, etc., Bridge Co.* v. *Douglass*, 12 Bush (Ky.), 673, 704; *Waterson* v. *Devoe*, 18 Kans. 233.

In Pennsylvania, it is said that a mortgagee is a purchaser in form, though he has no estate in the land mortgaged, and the transaction is governed by different principles from those which apply to a chose in action. *Wetherill's Appeal*, 3 Grant (Penn.), 281. And that a mortgagee, for benefit of creditors, is regarded as standing in the position of an assignee, and as representing the rights of the mortgagor only. *Spackman* v. *Ott*, 65 Penn. St. 131.

In Iowa, a mortgagee, as to the interest he holds in lands mortgaged, and notice of prior claims, or conflicting title, is to be regarded as a purchaser. *Hewitt* v. *Rankin*, 41 Iowa, 35. And in Alabama where a mortgage is made a security for a debt, contracted cotemporaneously with it, the mortgagee becomes a *bona fide* purchaser, entitled to protection against an outstanding vendor's lien of which he had no notice. *Short* v. *Battle*, 52 Ala. 456. In Iowa, too, the mortgagee may evict the mortgagor without notice and retain the emblements; and, if a lease is granted subsequently to the execution of the mortgage without the concurrence of the mortgagee, he may evict the lessee without notice and retain the emblements. *Downard* v. *Groff*, 40 Iowa, 597.

The interest of a mortgagee in the mortgaged premises, after breach of the condition and before foreclosure, is not subject to levy and sale under an attachment, and the purchaser of such an interest, at an execution sale, acquires no title to or interest in the property. *Buckley* v. *Daley*, 45 Miss. 338.

Until a mortgagee has entered, or exercised some claim of ownership of land, no action will lie against him to recover possession of the land. *Lyman* v. *Hibbard*, 18 N. H. 233. If he is in possession, he is responsible for the rents and profits, and is allowed for the ordinary repairs, but not for permanent improvements placed upon the mort-

gaged premises merely for his convenience. *Adkins* v. *Lewis*, 5 Oreg. 292; *Cook* v. *Ottawa University*, 14 Kans. 548; *Strang* v. *Allen*, 44 Ill. 428; *Reynolds* v. *Canal and Banking Co.*, 30 Ark. 520. He may also be allowed as compensation for managing the property five per cent on the rents collected, but not on the amount expended in repairs and improvements also, unless his services are worth actually more than five per cent on the rents. *Gerrish* v. *Black*, 104 Mass. 400.

In the absence of any stipulation in the contract, that the mortgagee shall have the rents and profits, he has no claim thereto merely on the ground that the debt is due and the title become absolute, but is only entitled to a receiver for the collection and appropriation of the rents where the property is insufficient to pay the debt, and the mortgagor is insolvent, or unable to pay any deficiency that might remain after sale of the property mortgaged. *Myers* v. *Estell*, 48 Miss. 373. And a mortgagee of an equity of redemption, who has never taken possession under his mortgage, but has permitted the assignees of the mortgagor to remain in possession, has no greater claim to rents and profits of them, than he would have had of the mortgagor if he had continued in possession. *Walker* v. *King*, 44 Vt. 601. By virtue of his mortgage a mortgagee acquires a lien on all that forms a part of the realty at the time it is given, and, on foreclosure, has a right of action for the property severed before the foreclosure. *O'Dougherty* v. *Felt*, 65 Barb. 220. And where the mortgagee acquires by the mortgage a right only to look to the land for payment, no other right can be acquired or transmitted by subrogation. *Fairman* v. *Heath*, 19 Ind. 63.

The relation between mortgagor and mortgagee is not one of trust and confidence, nor has the latter any duty to perform in respect to the lands mortgaged, even though in possession, which incapacitates him from purchasing an outstanding title thereto. *Ten Eyck* v. *Craig*, 2 Hun (N. Y.), 452; S. C., 62 N. Y. (17 Sick.) 406. But he cannot buy in an outstanding title under an arrangement with the mortgagor that it is to be held, like the mortgage, subject to redemption, and, when the title is acquired, turn around and insist that he has purchased as a stranger. He must allow the mortgagor to redeem. *Moore* v. *Titman*, 44 Ill. 367. And a mortgagor or one claiming under him cannot defeat the lien of a mortgagee by acquiring a tax title upon the land. *Fair* v. *Brown*, 40 Iowa, 209.

If the mortgagee obtain possession of the mortgaged premises with the assent of the mortgagor, after default of the latter, he may retain the possession until payment of the mortgage debt. *Roberts* v. *Sutherlin*, 4 Oreg. 219. In Pennsylvania, a mortgage passes to the mortgagee

the title and right of possession to hold till payment shall be made, and he may enter, take actual possession, use the land and receive its profits, until the debt secured is paid. He needs no legal remedy to enforce his rights. *Tryon* v. *Munson*, 77 Penn. St. 250.

A mortgagee has no equitable rights growing out of his mortgage lien, to have a receiver of the estate of the mortgagor beyond the property embraced in the mortgage. *State* v. *Jacksonville P. & M. R. R. Co.*, 15 Fla. 201.

A mortgagee cannot have his mortgage reformed and corrected on the ground of a mistake in describing the real estate, so as to make the mortgage cover another and different tract of land than that described therein, as against a judgment creditor who has purchased in good faith, for a valuable consideration, judgments rendered against the mortgagor after the execution of the mortgage. *Flanders* v. *O'Brien*, 46 Ind. 284.

A mortgagee may pay taxes on the mortgaged premises where the mortgagor neglects so to do, and have the amount included in his foreclosure judgment. *Stanclift* v. *Norton*, 11 Kan. 218; *Wright* v. *Langley*, 36 Ill. 381. But when a mortgagee insures on his own account, he is not, as a matter of course, entitled to charge the premium to the estate. *Pierce* v. *Faunce*, 53 Me. 351.

A mortgagee can maintain an action on the case, in the nature of waste or of trover, against the mortgagor or those claiming under him, for timber cut on the mortgaged premises after a decree of foreclosure and before the expiration of the time limited for redemption. *Hagar* v. *Brainerd*, 44 Vt. 294. But when he has received the full amount of the mortgage debt and assigned the mortgage, making no mention of any right of action on account of timber previously severed from the realty, all his rights thereto thereby become extinguished, and no legal claim to the amount due therefor can be asserted under the mortgage. *Kimball* v. *Lewiston, etc., Co.*, 55 Me. 494; *Kennerly* v. *Burgess*, 38 Mo. 440.

Moneys awarded by the State as compensation to the owners of land for depreciation in the value of real property, occasioned by the abandonment of a canal, are subject to the lien of a prior mortgage upon the land, to the extent necessary to satisfy any deficiency upon foreclosure sale of the premises. *Bank of Auburn* v. *Roberts*, 44 N. Y. (5 Hand) 192.

The lien of a mortgagee is not lost by an omission to prove his debt in bankruptcy, but he may enforce the mortgage after the termination of the bankruptcy proceedings, nor would such lien be divested by a sale of the land by the assignees. *Assignee* v. *Perkins*, 13 Bankr. Reg.

280. Nor does he lose his rights by participating in bankruptcy proceedings, such as voting for an assignee. Nor does a sale of the mortgaged property by the assignee interfere with his rights. In such case the bankrupt court only passes such title as the bankrupt himself could pass. *King* v. *Bowman*, 24 La. Ann. 506

Parcels of land covered by a mortgage, and originally subject thereto, will so continue, unless discharged by some act of the mortgagee (*Rice* v. *Dewey*, 54 Barb. [N. Y.] 455); and although the mortgage debt has been reduced to a judgment which, by lapse of time, has ceased to be a lien. *Priest* v. *Wheelock*, 58 Ill. 114.

When a mortgage is conditioned to pay a sum of money, or well and truly to support the mortgagees and the survivor of them during their natural lives, and the mortgagor has elected the latter alternative, he cannot assign his interest in the premises without the consent of the mortgagees. *Bryant* v. *Erskine*, 55 Me. 153.

A mortgagee has no right to sacrifice the property mortgaged, so as to deprive the mortgagor of a surplus which might otherwise arise. *Stoddard* v. *Denison*, 7 Abb. (N. Y., N. S.) Pr. 309; S. C., 38 How. Pr. 296.

Trespass *quare clausum* cannot be maintained by a mortgagee of a farm, before entry, against one holding under the mortgagor, and who cuts and removes the grass growing thereon. *Hewes* v. *Bickford*, 49 Me. 71.

A mortgagee has no power to authorize another party to enter upon the mortgaged property and remove fixtures therefrom, and the rights of the mortgagor are not affected by such authority given by the mortgagee. *Hill* v. *Gwin*, 51 Cal. 47. And a mortgagee whose debt is due, but who has not entered into possession, cannot maintain *replevin* for a specific chattel, which the mortgagor, or his assigns, has severed and removed from the realty, and which before severance was a fixture or part of the realty, and subject to the mortgage. *Kircher* v. *Schalk*, 39 N. J. Law, 335. But it would seem to be otherwise, under the English doctrine. *Holland* v. *Hodgson*, L. R., 7 C. P. 328; 2 Eng. Rep. 655.

§ 5. **Joint mortgagees.** Where a mortgage is given to two persons to secure their several debts, the mortgagees will take, not by moieties, but in proportion to their respective debts. *Donnels* v. *Edwards*, 2 Pick. 617. And each mortgagee may enforce his rights in his own name. *Gilson* v. *Gilson*, 2 Allen (Mass.), 115. If the mortgage be given to secure a joint debt, the mortgagees are joint tenants of the mortgage estate, with the right of survivorship, even in States where, by statute, a joint ownership of lands creates a tenancy in common.

And a release by one of the mortgagees, in such case, of the debt is a discharge of the mortgage upon the land. *Appleton* v. *Boyd*, 7 Mass. 131. But as soon as the mortgage has been foreclosed and the legal estate made absolute, it is converted into a tenancy in common between the owners thereof. *Goodwin* v. *Richardson*, 11 Mass. 469; *Johnson* v. *Brown*, 11 Fost. (N. H.) 405; *Tyler* v. *Taylor*, 8 Barb. 585; *Rigden* v. *Vallier*, 2 Ves. Sr. 258. If one of two *joint* mortgagees die before foreclosure of the mortgage, the survivor may bring an action to foreclose the same. *Williams* v. *Hilton*, 35 Me. 547; *Appleton* v. *Boyd*, 7 Mass. 131. But if the debts are distinct, the survivor of the mortgagees cannot sustain an action in his own name, to foreclose the mortgage for the debt due the deceased. *Burnett* v. *Pratt*, 22 Pick. 556.

If there be a joint mortgage made to two, to secure a debt due to one of them, the legal estate vests in them as tenants in common, the one having no interest in the mortgage debt, being a trustee of the estate for the benefit of him who owns the debt. *Root* v. *Bancroft*, 10 Metc. 44. In a suit for contribution, by one of several mortgagees against another, it is good ground of demurrer that all the mortgagees were not made defendants. *Carr* v. *Waldron*, 44 Mo. 393.

§ 6. **Junior mortgagees.** The holder of a second mortgage cannot control the sale or disposal of proceeds under the first mortgage, without making payment. *Andrews* v. *Fiske*, 101 Mass. 422; *Meysenburg* v. *Schlieper*, 46 Mo. 209. But the execution of a mortgage to raise money with which to discharge a prior incumbrance will entitle the mortgagee, upon the application to that object of the money thus raised, to be subrogated to the rights of the prior incumbrancer. *Gilbert* v. *Gilbert*, 39 Iowa, 657. And it is sufficient to entitle a junior incumbrancer to be subrogated to the rights of a senior mortgagee, if he tender to such senior mortgagee the amount secured by his mortgage, with interest and costs before the foreclosure sale, though the amount tendered be not accepted until after such sale. *Marshall* v. *Ruddick*, 28 Iowa, 487; *Dings* v. *Parshall*, 7 Hun (N. Y.), 522. The right of a subsequent mortgagee to pay off a debt secured by a prior mortgage is not affected by an agreement by the parties to such prior mortgage for a higher rate of interest than that specified in the mortgage. *Gardner* v. *Emerson*, 40 Ill. 296.

Where a party holds a second mortgage, and his equity of redemption has been cut off by the foreclosure of the first, he may sometimes have the right of subrogation, or even be entitled to an assignment but it will depend on circumstances showing its equity, and he will not be entitled to a stay of the sale by injunction, without clearly showing

that the payment of the first or its foreclosure or sale will work him injustice. *Bloomingdale* v. *Barnard*, 7 Hun (N. Y.), 460.

A party who purchases the equity of redemption in a first mortgage, with a full knowledge of the rights of the assignees of the mortgagee, and who, as mortgagee under a second mortgage, is tenant in common with the assignees of the first, in the lands therein conveyed, which lands are charged with an incumbrance under a decree of partition, is primarily bound to extinguish such incumbrance, as well as all others existing or afterward accruing. *Pullen* v. *Heron Mining Co.*, 71 N. C. 563.

A mortgage of all the property of a railroad company already or afterward acquired, in equity binds after-acquired property, as against the mortgagors, and all persons claiming under them, except purchasers for value and without notice; and especially as against claimants under a junior mortgage, which by its terms is subject to the prior mortgage, and against junior judgment creditors. *Stevens* v. *Watson*, 4 Abb. (N. Y.) App. Dec. 302; 45 How. 114.

Where a senior mortgagee, at his foreclosure sale, bought in the mortgaged premises for less than the debt, and after receiving his certificate of purchase procures an award for a special execution to make the residue, a junior mortgagee, redeeming under the statute from the sale, takes the land free from any lien of the first mortgage. *Seligman* v. *Laubheimer*, 58 Ill. 124.

As to the right of senior and junior mortgagees regarding each other as well as the mortgagor, see *Carpentier* v. *Brenham*, 40 Cal. 221, where they are considered at length and fully reviewed.

Where a mortgagee of lands, subsequent to the lien of a judgment, fails to redeem the land on sale on the judgment, his mortgage is extinguished by virtue of such sale. *Hill* v. *Pixley*, 63 Barb. (N. Y.) 200. And a mortgagee who diminishes the security of a second mortgagee, by releasing the mortgagor's personal liability, if he does not absolutely discharge the premises from the lien of his mortgage, as in the case of a subsequent purchaser, at least subordinates his lien to that of such second mortgagee. *Sexton* v. *Pickett*, 24 Wis. 346.

A purchaser at a sale under an elder mortgage cannot intervene to keep down the amount claimed in a suit by the mortgagor by a junior mortgagee. *Bronson* v. *Railroad Co.*, 2 Black (U. S.), 524.

Taxes being charged as much upon the mortgage interest as upon the equity of redemption, a subsequent mortgagee cannot, by purchasing the true title, use it adversely to the first mortgage, and such title will inure to the protection, not the destruction, of the regular title. *Horton* v. *Ingersoll*, 13 Mich. 409.

Subsequent incumbrancers are supposed to have acquired their interests with reference to existing liens on the premises, of which they had notice, and are, therefore, entitled to have payments applied, so far as to reduce those liens as they appear of record; and their rights cannot be prejudiced by private arrangements of parties, though such may be binding as between the parties themselves. *Whitacre* v. *Fuller*, 5 Minn. 508. But a junior mortgagee cannot avail himself of usury in the senior mortgages. *Powell* v. *Hunt*, 11 Iowa (3 With.), 430.

Where a party holds a third mortgage, the two prior ones being held by another, who has obtained judgment of foreclosure and sale on them, he cannot, as such, claim to be subrogated to the first, nor is he entitled to a stay of the sale by injunction. If he had any ground to equitable relief, he should have set it up on the foreclosure. As mere third mortgagee his rights as such are protected by the opportunity to purchase at the sale or pay up beforehand. *Bloomingdale* v. *Barnard*, 7 Hun (N. Y.), 459.

§ 7. **Sureties or guarantors of mortgage.** A surety may be substituted in the place of the creditor to whom the principal debtor has made a mortgage as security for the payment of the debt, if such surety is compelled to pay it. *Cheesebrough* v. *Millard*, 1 Johns. Ch. 409; *Root* v. *Bancroft*, 10 Metc. 48; *Burton* v. *Wheeler*, 7 Ired. Eq. 217; *Ohio Life Ins. Co.* v. *Winn*, 4 Md. Ch. Dec. 253. So, a creditor may avail himself, as a security for his debt, of the benefit of a mortgage which his debtor has made to a surety for such debt by the way of indemnity. *Curtis* v. *Tyler*, 9 Paige's Ch. 432; *Moore* v. *Moberly*, 7 B. Monr. 299; *Eastman* v. *Foster*, 8 Metc. 19; *Stewart* v. *Preston*, 1 Fla. 10. As where one gives to an accommodation indorser a mortgage of indemnity, and both maker and indorser become insolvent, the holders of the notes may avail themselves of the mortgage security (*Rice* v. *Dewey*, 13 Gray, 47); and one surety may avail himself of a mortgage made by the principal to his co-surety. *Hall* v. *Cushman*, 16 N. H. 462.

The right of subrogation, though originally a doctrine of equity, has become recognized as a legal right. *LaFarge* v. *Herter*, 11 Barb. 159; 5 Seld. 241; *Aiken* v. *Gale*, 37 N. H. 501. And if two co-debtors mortgage land belonging to them jointly to secure a joint debt, and one of them is obliged to pay the whole debt, he becomes in technical language subrogated to the place of the mortgagee, as to the mortgage upon the co-debtor's half of the estate, as security for his contributing his share of the debt. *Sargent* v. *McFarland*, 8 Pick. 502. But if, as between the debtors, one is the principal and the other the surety in the mortgage debt, and the real principal of the debt pay it,

the doctrine of subrogation as to the land of the other mortgagor does not apply. *Crafts* v. *Crafts*, 13 Gray, 362; *Cherry* v. *Monro*, 2 Barb. Ch. 618.

A surety may have the benefit of the mortgage to the creditor by the principal debtor, even though, before he has been called on to pay the debt, the mortgagor has sold and conveyed the estate to another. *Gossin* v. *Brown*, 11 Penn. St. 527. And where a creditor voluntarily does an act invalidating or discharging the security that he holds from the principal for a debt to which there is a surety, he will, thereby, lose his claim on the surety, to the same extent as the latter is injured by such act of the creditor. *Hayes* v. *Ward*, 4 Johns. Ch. 123. But a surety is not entitled to be substituted as to the security until the whole debt shall have been paid. *Stamford Bank* v. *Benedict*, 15 Conn. 437. And he may lose the benefit of the subrogation by his own laches in suffering other persons to acquire a valuable interest in the land in consequence of his omitting to make known his own claim upon it. *Jarvis* v. *Whitman*, 12 B. Monr. 97.

Where one purchases land, and assumes in his deed to pay off a bond and mortgage of his grantor to which the land is subject, he thereby becomes a surety in respect to the mortgage debt. *Klapworth* v. *Dressler*, 2 Beasley (N. J.), 62; *Hoysradt* v. *Holland*, 50 N. H. 433. But a promise by the grantee to the grantor, to pay a mortgage debt as part of the purchase-money of the land conveyed, does not render the grantee surety for the grantor, but, as between the parties, the grantee is the principal debtor and the grantor the surety. *Huyler* v. *Atwood*, 26 N. J. Eq. 504. The acceptance by the grantee of a deed conveying lands subject to a specified mortgage and providing that he shall assume and pay the mortgage, binds him as effectually as though the deed were *inter partes* and executed by both grantor and grantee. The mortgagee may treat both the mortgagor and his grantee under such a promise as principal debtors, and may have a personal decree against either or both. *Crawford* v. *Edwards*, 33 Mich. 354.

An indorser upon a note not yet matured, gave a mortgage upon a vessel to secure his contingent liability, by which he was entitled to an extension of time for payment. It was held in this case that the mortgagee was to be deemed a mortgage, for a valuable consideration, and entitled, as such, to intervene for the protection of his interest in a libel filed against the vessel to recover wages. Either the extension of time for payment of the debt, or the waiver by the holder of the note of the right to sue the indorser, and in such suit to attach the vessel, constituted a sufficient consideration for this purpose. *The Dubuque*, 2 Abb. (U. S.) 20.

Where the principal debtor executes to the payee of a note, on which there is personal security, a mortgage for further security, until the surety pays the debt, he has no right to be subrogated to the rights of the mortgagee, and to have the mortgaged premises sold and the money paid to him. *Conwell* v. *McCowan*, 53 Ill. 363.

For an exhaustive collation and discussion of the doctrine of subrogation, and substitution as applicable to the parties to a mortgage, see *Rardin* v. *Walpole*, 38 Ind. 146.

§ 8. **Sureties, etc., indemnified by mortgage.** Where a mortgage is given, not to secure a debt, but to indemnify a surety, there the security does not in the first instance attach to the debt, as an incident to it, but whatever equity may arise in favor of the creditor with regard to the security arises afterward, and comes into existence only upon the insolvency of the parties holden for the debt. *Jones* v. *Quinnipiack Bank*, 29 Conn. 25.

Where several debts are secured by a mortgage, for some of which there are sureties who are not parties to the mortgage, the mortgagee becomes the trustee for the sureties to the amount of the funds thus provided for their indemnity; and upon a sale of the mortgaged property, the mortgagee must see that their just proportion of the proceeds of the sale is applied to the discharge of the debt on which the sureties are bound. *Fielder* v. *Varner*, 45 Ala. 429.

Where one conveys land to a trustee for the benefit of a surety, conditioned that the conveyance shall be void if the grantor shall pay certain debts for which the surety is liable, the assent of the creditor will be presumed even though the conveyance was made without his knowl edge, and the deed will be held, not only as indemnity to the surety, but as security for the debt. The trustee cannot discharge or defeat the trust, except to a purchaser for a valuable consideration, without notice. *Carpenter* v. *Bowen*, 42 Miss. 28.

If the owner of land makes two mortgages thereof, and in the second mortgage, which is given merely to indemnify a surety upon a note, who has since paid nothing thereon, reserves to himself the right to cut and dispose of all the wood on the premises, and in the first mortgage stipulates for the right to make coal from the wood under an agreement which provides that he shall deliver the same to the first mortgagees, and that the amount that may be due thereon shall be indorsed on the mortgage note, an assignee of the second mortgage has no right to complain, in a suit against him to foreclose the first mortgage, of a settlement fairly made between the mortgagor and the first mortgagees, by which the amount to be so indorsed is ascertained and determined, and is indorsed accordingly, although in such settlement a

set-off was allowed for supplies furnished by them to enable the mortgagor to go on with his work, and to a third person with whom he had a contract respecting the same subject-matter, but conditional judgment will be entered for the amount due on the note after deducting the indorsement. *Pomeroy* v. *Latting*, 2 Allen (Mass.), 221.

§ 9. **Possession of mortgaged property.** Where lands are conveyed in mortgage, the mortgagee, as against the mortgagor and all persons claiming under him, is taken to be the owner of the fee, and as the right of possession follows the right of property, if there be no stipulation to restrain it, he is entitled to possession before condition broken, and is liable to be dispossessed only by performance of the condition at the time limited. *Erskine* v. *Townsend*, 2 Mass. 493; *Blaney* v. *Bearce*, 2 Greenl. 132; *Collins* v. *Torry*, 7 Johns. 278. Otherwise, in some of the States. *Trimm* v. *Marsh*, 54 N. Y. (9 Sick.) 599. But where it appears by necessary implication from the condition of the mortgage that the understanding of the parties must have been that the mortgagor should remain in possession of the land, the mortgagee cannot maintain a writ of entry to recover the land, until the condition be broken, or waste be done. *Hartshorn* v. *Hubbard*, 2 N. H. 453. Where a person, by taking possession of mortgaged premises, disseizes the mortgagor, he also disseizes the mortgagee, and, while the disseizor remains in possession, the deed of the mortgagee will not pass his, the mortgagee's, interest in the land. *Poignand* v. *Smith*, 8 Pick. 272.

Permission to the mortgagee to take possession of the mortgaged premises, given by the mortgagor's administrator after he had parted with the title, is of no more force than if given by a stranger. *Newton* v. *McKay*, 30 Mich. 380. Under the statutes of Michigan, a mortgagor is entitled to recover possession from his mortgagee at any time before his rights have been foreclosed in some manner. *Humphrey* v. *Hurd*, 29 Mich. 44.

§ 10. **Nature of mortgagor's possession.** The rights of the mortgagor and of the mortgagee in the matter of possession of the mortgaged premises are so independent and distinct, that if either, while in possession, or any one claiming under him, commits waste by acts which essentially impair the value of the inheritance, the other may restrain him from so doing by an injunction through a court of chancery. *Given* v. *M'Calmont*, 4 Watts, 460; *Fay* v. *Brewer*, 3 Pick. 204; *Smith* v. *Moore*, 11 N. H. 55. But the possession of the mortgagor to a certain extent is the possession of the mortgagee. *Partridge* v. *Bere*, 5 B. & Ald. 604; *Chapman* v. *Armistead*, 4 Munf. 382; *Gould* v. *Newman*, 6 Mass. 239; *Beach* v. *Royce*, 1 Root, 244. In Vermont,

the mortgagor's possession after condition broken is as tenant at will to the mortgagee or his assignees; so that if he cut timber and the assignee, coming into possession, use it, trover will not lie. *Morey* v. *McGuire*, 4 Vt. 327. See, too, *Judd* v. *Woodruff*, 2 Root, 298.

Where a mortgagor continues in possession of the mortgaged premises, and there is no contract on the subject, he may be considered either as a trespasser or as a tenant at will, at the election of the mortgagee. *Pettengill* v. *Evans*, 5 N. H. 54; *Blaney* v. *Bearce*, 2 Greenl. 132. And a mortgagor in possession does not bind his mortgagee in passing any right of his in the premises to third persons. *Ellithorp* v. *Dewing*, 1 Chip. 141; *Beacher* v. *Cook*, 1 Root, 296.

A mortgagor, so long as he remains in possession, or until actual entry by the mortgagee, may receive the rents and profits to his own use, and is not liable to account therefor to the mortgagee. *Fitchburgh Manuf. Co.* v. *Melven*, 15 Mass. 268. Nor is he liable even for such as may accrue between the time of the commencement of the action to foreclose, and the time of taking possession upon execution. *Mayo* v. *Fletcher*, 14 Pick. 525.

The possession of a mortgagor must be presumed to be in subordination to the title of the mortgagee until the contrary is shown. *Conner* v. *Whitmore*, 52 Me. 185; *Dadmun* v. *Lamson*, 9 Allen, 85. A mortgagor in possession may maintain an action for injury to timber growing on the mortgaged premises. *Annapolis, etc., R. R. Co.* v. *Gantt*, 39 Md. 115. But neither the mortgagor nor his grantee, when in possession, can acquire any rights hostile to the mortgagee by paying the taxes on the mortgaged premises. It is their duty to do so; and the mortgagee may well regard such payment as a protection of his interest. *Medley* v. *Elliott*, 62 Ill. 532.

§ 11. **Nature of mortgagee's possession, his rights and duties.** A mortgagee, who has gone into peaceable possession of the mortgaged premises after a default, cannot be ejected by the mortgagor while the mortgage remains unsatisfied. *Hennesy* v. *Farrell*, 20 Wis. 42; *Den* v. *Wright*, 2 Halst. 175; *Pace* v. *Chadderdon*, 4 Minn. 499; *Sahler* v. *Signer*, 44 Barb. (N. Y.) 606. The mortgagee after condition broken is entitled to the possession of the premises and may maintain trespass *quare clausum* for an injury thereto. *Harris* v. *Haynes*, 34 Vt. (5 Shaw) 220; *Pettengill* v. *Evans*, 5 N. H. 54; *Bussey* v. *Page*, 14 Me. 132. When a mortgagee elects to consider his mortgagor in possession, after condition broken, as his tenant, he is a tenant at sufferance and not entitled to notice to quit, and a purchaser from the mortgagor would be in no better condition than his vendor. *Jackson* v. *Warren*, 32 Ill. 331. But a mortgagee in possession, after having

received payment of the debt, will not be protected by the statute of limitations, unless it be shown that he has held adversely to the mortgagor for the period which limits recovery of the land. Their relation is analogous to that of trustee and *cestui que trust*, and the possession by either is not, as to the other, adverse. *Green* v. *Turner*, 38 Iowa, 112. The payment and release of a mortgage terminates the right of possession by the mortgagee or by his lessee. *Holt* v. *Rees*, 44 Ill. 30. In Minnesota the mortgagee, after default in payment and before foreclosure, has no right to possession, or to timber growing and cut on the land, though he may protect his security by injunction and otherwise. *Adams* v. *Corriston*, 7 Minn. 456.

A mortgagee *may* make a *bona fide* purchase of the equity of redemption, and thereby acquire an absolute title. *Green* v. *Butler*, 26 Cal. 595. But a mortgagee, who has taken possession for the purpose of foreclosing the mortgage, can acquire no title to the property by a purchase at a collector's sale for the taxes; he may pay the taxes, and then add the amount paid to the mortgage debt. *Brown* v. *Simons*, 44 N. H. 475. Where the owner of a mortgage on an undivided interest in land is also the owner of another undivided interest in the same tract of land, his entry into possession of the whole tract does not constitute him a "mortgagee in possession." *Davenport* v. *Turpin*, 41 Cal. 100.

A mortgagee has a legal right to the rents and profits of the mortgaged estate. *Cortleyeu* v. *Hathaway*, 3 Stockt. (N. J.) 39; *Myers* v. *White*, 1 Rawle, 353; *Weidner* v. *Foster*, 2 Pen. & W. 23. But at common law the mortgagee cannot recover rent of the mortgagor for the time he suffers him to retain possession of the premises, unless the mortgagor take a lease, which he may do, from the mortgagee, under which he can hold possession against the mortgagee. *Kunkle* v. *Wolfersberger*, 6 Watts, 131.

A mortgagee in possession, who has received rents and profits in amount sufficient to satisfy the mortgage, is not thereby divested of his character as a mortgagee in possession, so that ejectment will lie against him; but an action for an accounting must be brought to have the amount ascertained and applied. *Hubbell* v. *Moulson*, 53 N. Y. (8 Sick.) 225; 13 Am. Rep. 519.

A mortgagee in possession is responsible for the rents and profits, and is allowed for the taxes and the ordinary repairs. *Adkins* v. *Lewis*, 5 Oreg. 292; *Cook* v. *Ottawa University*, 14 Kan. 548; *Strang* v. *Allen*, 44 Ill. 428. But as a general rule he is entitled to no credit for permanent improvements made on the premises free of cost although their construction was necessary for the protection of the crops, or enhanced the rental value. *Hidden* v. *Jordan*, 32 Cal. 397; S. C., 28

id. 301; *Adkins* v. *Lewis*, 5 Oreg. 292; *Cook* v. *Ottawa University*, 14 Kan. 543. He is only responsible for the rents actually received, unless he has been guilty of fraud or willful neglect, but the mortgage debt will be credited with the amount of rents received by one of the mortgagees individually, unless shown to have been derived from a source extrinsic and independent of the mortgage. *Barron* v. *Paulling*, 38 Ala. 292. And when he is not in actual possession of the mortgaged premises, by himself or his tenant, and has received no part of the profits, and has not used his mortgage to interfere with the claim of subsequent incumbrancers, or to protect the possession of the mortgagor, he is not chargeable with any part of the profits. *Demarest* v. *Berry*, 1 C. E. Green (N. J.), 481. If he be in possession, and after due diligence to let the premises advantageously, has agreed upon the terms of a lease, and carried out his agreement, he is not chargeable with a higher rent, although after the letting he was offered such higher rent, by the solicitor of the mortgagor in the name of the client, especially if it appear that the offer was not so authoritative as to bind the client. *Hubbard* v. *Shaw*, 12 Allen (Mass.), 120. A mortgagee, who has taken possession of the mortgaged premises for the purpose of foreclosure under the statute, is not accountable for rents and profits when he has not received them, but has allowed the mortgagor to continue his occupation. *Bailey* v. *Myrick*, 52 Me. 132. And a mortgagee in possession, who sells part of the mortgaged property under a power of sale in the mortgage, must apply the proceeds of sale, first in payment of interest and costs, and then either pay the balance to the mortgagor or apply it in reduction of the principal due on the mortgage; and, in taking an account against the mortgagee, who has retained sale moneys beyond the interest and costs due, a rest must be made at the time of the receipt of the proceeds of sale, even although he may have entered into possession when the interest due to him was in arrear. *Thompson* v. *Hudson*, L. R., 10 Eq. 497; S. C., 23 L. T. (N. S.) 278.

Allowances for rents, profits and waste can only be claimed by a mortgagor, either on bill to foreclose, or bill to redeem, against a mortgagee in possession as mortgagee. He cannot be called to account in such suits for trespasses committed by him; nor, if he is in possession under a lease from the mortgagor, can the mortgagor claim an allowance for rent due on the lease, or waste committed as tenant. *Onderdonk* v. *Gray*, 4 C. E. Green (N. J.), 65. It is not the duty of either the mortgagee or the purchaser of the equity of redemption of a part of lands mortgaged to enjoin the committing of waste, nor will the failure of the mortgagee to enjoin the commission of any acts affecting the per-

manent value of the property mortgaged, release from the mortgage the property so purchased, or furnish ground for requiring an account from the mortgagee, at the instance of such purchaser, and a credit upon the mortgage debt of the amount of waste committed upon other pieces of property included in the mortgage. *Knarr* v. *Conaway*, 42 Ind. 260.

The rule that a trustee who has so intermingled the trust property with his own, as to render it impracticable to ascertain how much of certain charges ought to be borne by the trust estate, is entitled to no allowance in respect to such charges, was applied to charges of a mortgagee in possession for taxes levied upon the whole property. *Elmer* v. *Loper*, 25 N. J. Eq. 475. A mortgagee in possession of business premises is entitled to carry on business for a reasonable time, so as to enable him to sell as a going concern, and for that purpose to use the name of the mortgagor's firm. *Cook* v. *Thomas*, 24 W. R. 427.

§ 12. **Conveyances by mortgagor.** Where the purchaser of land accepts a deed expressly conveying such land subject to a mortgage, and excepting such mortgage from the covenants of warranty and against incumbrances, but does not himself covenant to pay the mortgage, the land is primarily liable as between him and the vendor; and the vendor is liable for any deficiency after a foreclosure sale fairly made. *Cleveland* v. *Southard*, 25 Wis. 479; *Johnson* v. *Zink*, 51 N. Y. (6 Sick.) 333; S. C., 52 Barb. 396. The mortgagor becomes *quasi* surety and has a right to insist upon the collection, first, out of the mortgaged land. *Harris* v. *Jex*, 66 Barb. 232.

Generally, where a mortgagor conveys away part of the mortgaged premises, the portion retained is primarily liable for the payment of the mortgage debt. If, however, by the terms of the sale, the mortgage is to remain a common charge upon the whole, and to be paid by the mortgagor and purchaser without any specific agreement as to the proportion which each one is to pay, they must contribute according to the relative value of each one's part. *Hoy* v. *Bramhall*, 4 C. E. Green (N. J.), 74, 563.

When a mortgagor makes successive sales of distinct parcels of the mortgaged premises to different persons having notice of the prior sales, the different parcels are to be subjected to the payment of the mortgage in the inverse order of their alienation. *Iglehart* v. *Crane*, 42 Ill. 261; *Meng* v. *Houser*, 13 Rich. (S. C.) Eq. 210; *Root* v. *Collins*, 34 Vt. (5 Shaw) 173; *Day* v. *Patterson*, 18 Ind. 114; *Mobile, etc., Co.* v. *Huder*, 35 Ala. 713; *Ogden* v. *Glidden*, 9 Wis. 46.

The assignee of an equity of redemption, who accepts a deed with

out covenants for the mortgaged estate, takes it in the absence of an agreement to the contrary, charged with the payment of the mortgage debt. *Atherton* v. *Toney*, 43 Ind. 211. See, too, *Dadmun* v. *Lamson*, 9 Allen (Mass.), 85.

Where lands are sold subject to a mortgage previously executed by the seller, the purchaser, by agreeing to pay the mortgage debt when due as a part of the purchase-price, becomes, as between him and the seller, the principal debtor for the payment of the mortgage, and the seller his surety. *Mills* v. *Watson*, 1 Sweeny (N. Y.), 374. Such a grantee cannot question the consideration or validity of the mortgage. He is bound for the full amount of the mortgage as expressed in the deed, it being so much of the purchase-money, notwithstanding the fact that a portion only of the amount was loaned upon it by the mortgagee. *Freeman* v. *Auld*, 44 N. Y. (5 Hand) 50. But the grantee in a deed of mortgaged premises, merely reciting that he is to pay off the mortgage, is not liable to a personal judgment for the amount of the mortgage debt. *Mason* v. *Barnard*, 36 Mo. 384.

A deed in the nature of a mortgage, given by a tenant in common upon his undivided interest in lands, leaves in him an estate, which entitles him to apply for partition. In such case, the mortgage deed is to be transferred as a lien, exclusively to the share set off to the mortgagor. *Kline* v. *McGuckin*, 24 N. J. Eq. 411.

The equities existing between the assignor and the assignee of a chose in action, not negotiable, attend the title transferred to a subsequent assignee for value and without notice. The latter takes the exact position of his vendor. *Bush* v. *Lathrop*, 22 N. Y. (8 Smith) 535.

The *bona fide* assignee of a mortgage, for value, nas been held not to take it subject to all the infirmities which attach to it in the hands of the mortgagee. *Farmers' National Bank* v. *Fletcher*, 44 Iowa, 252.

§ 13. **Conveyances by mortgagee.** Whatever may be the term applied to a mortgagee's interest, whether lien or estate, it requires a deed to create it, and the ordinary rules of registration apply to this as to other deeds of conveyance. *Schmidt* v. *Hoyt*, 1 Edw. Ch. 652; *Rigney* v. *Lovejoy*, 13 N. H. 247; *Philips* v. *Bank of Lewistown*, 18 Penn. St. 394; *Erwin* v. *Shuey*, 8 Ohio St. 510. An assignment of a mortgage is a conveyance of real estate to the assignee. *Robinson* v. *Ryan*, 25 N. Y. (11 Smith) 320; *Ruggles* v. *Barton*, 13 Gray, 506; *Philips* v. *Bank of Lewiston*, 18 Penn. St. 394. A deed of quit-claim, or a mortgage of the premises in the usual form, by the mortgagee to a third party, will operate as an assignment of his interest as mortgagee. *Hunt* v. *Hunt*, 14 Pick. 374; *Cole* v. *Edgerly*, 48 Me.

112; *Collamer* v. *Langdon*, 29 Vt. 32. And a deed with covenants of warranty would convey all the grantor's right and operate as an equitable assignment of the debt secured by the mortgage. *Lawrence* v. *Stratton*, 6 Cush. 163; *Givan* v. *Doe*, 7 Blackf. 210; *Olmsted* v. *Elder*, 2 Sandf. 325.

§ 14. **Rights of purchasers of the premises.** The purchaser of mortgaged premises does not, in the absence of a special contract, become personally liable for the mortgage debt; the creditor's remedy is against the property only. *Johnson* v. *Monell*, 13 Iowa (5 With.), 300. But he has a right to the surplus which may remain to be accounted for by the mortgagee, upon a sale of the premises under the power of sale. *Buttrick* v. *Wentworth*, 6 Allen, 79.

A grantee of land by quit-claim deed, for the consideration of one dollar, is not bound to pay the usurious mortgage of his grantor, unless it is shown that he agreed to pay the debt secured by the said mortgage or that it should be paid out of the land. *Ludington* v. *Harris*, 21 Wis. 239. But a purchaser, who has been let into undisturbed possession and has given his vendor a mortgage of the premises to secure the price, will be compelled to pay the balance of the purchase-money unless he proves the existence of valid adverse liens, or of a title paramount to that derived from his grantor. *Brunette* v. *Schettler*, 21 Wis. 188.

No dedication to public use, of portions of a parcel of land, made by the general owner, after giving a mortgage upon it, can affect the lien of the mortgage, but a purchaser at a sale on foreclosure will take title free of the dedication. *Hague* v. *Inhabitants of West Hoboken*, 23 N. J. Eq. 354. Where a mortgagor, while owing the equity of redemption, erects a house upon the mortgaged premises, without any agreement with the mortgagee, it becomes a part of the realty, and passes with it to a purchaser under the foreclosure of the mortgage.

§ 15. **Purchase of premises by mortgagee.** A mortgagee may make a *bona fide* purchase of the equity of redemption, and thereby acquire an absolute title. *Green* v. *Butter*, 26 Cal. 595; *Hinkley* v. *Wheelwright*, 29 Md. 341; *Wynkoop* v. *Cowing*, 21 Ill. 570; *Gwinn* v. *Smith*, 55 Ga. 145. But this is always regarded with great jealousy by courts of equity, and will be avoided for fraud actual or constructive, or for any unconscionable advantage taken by the mortgagee in obtaining it. *Russell* v. *Southard*, 12 How. (U. S.) 139; *Platt* v. *McClure*, 3 Woodb. & M. 151; *Hyndman* v. *Hyndman*, 19 Vt. 9.

A mortgagee in possession may purchase for his own benefit the title of the mortgagor, on an execution sale against him upon a judgment in favor of a third person; and he may set up a title so acquired,

as a defense to an action by the mortgagor or his grantee to redeem. *Ten Eyck* v. *Craig*, 62 N. Y. (17 Sick.) 406. But a mortgagee has no right in an action at law on the debt secured by the mortgage to sell and buy in the mortgaged lands. In such case if he purchases one part and a stranger the other, the lands are left as they stood before the sale, and the stranger's purchase, if valid at all, amounts to a purchase of the equity of redemption; and the latter has a right to demand that all the mortgaged lands be brought before the court for foreclosure, in order to have each part bear its proportion of the entire indebtedness. *Young* v. *Ruth*, 55 Mo. 515.

Where a mortgage contains a power of sale whereby, upon failure to perform by the mortgagor, the mortgagee may sell at public auction, if the authority to make the sale is executed and regulated by statute, the mortgagee may himself become the purchaser. *Bergen* v. *Bennett*, 1 Caines' Cas. 1. But he cannot do so, and thereby extinguish the mortgagor's right of redemption against his consent, where the sale is made by agreement between the parties, though made at public auction. It is in the nature of a trust to sell, where the trustee cannot himself be purchaser. *Hyndman* v. *Hyndman*, 19 Vt. 9.

The rule that a mortgagor cannot, through a tax deed, acquire a title which will defeat a mortgage, was applied in case of a tax deed acquired by a grantee under a warranty deed excepting from its covenants an existing mortgage and all back taxes, but executed after the purchase from the mortgagor. *Stears* v. *Hollenbeck*, 38 Iowa, 550.

§ 16. **Rights of mortgagor's creditors.** A creditor may avail himself, as a security for his debt, of the benefit of a mortgage which his debtor has made to a surety for such debt by the way of indemnity. *Ten Eyck* v. *Holmes*, 3 Sandf. Ch. 428; *Eastman* v. *Foster*, 8 Metc. 19; *Stewart* v. *Preston*, 1 Fla. 10.

Where a railroad company executes a mortgage by the terms of which it is clearly implied that the company is to hold possession and receive the earnings of the road until the mortgagees should take it or the proper judicial authority intervene, such possession gives the right to the whole fund derived therefrom and renders it, therefore, liable to the creditors of the company as if no mortgage existed. *Gilman* v. *Illinois, etc., Tel. Co.*, 91 U. S. (1 Otto) 603.

A creditor by note and mortgage may obtain judgment on the note and subject other property of his debtor to its payment. *Karnes* v. *Lloyd*, 52 Ill. 113.

Where a creditor of an estate represented insolvent, whose claim is partly secured by mortgage, has his whole claim allowed, and

receives a dividend upon the whole, he waives his security by the mortgage. *Hooker* v. *Olmstead*, 6 Pick. 481.

§ 17. **Rights and liabilities of purchasers.** The purchaser of mortgaged property, who assumes the payment of the mortgage debt, becomes personally liable therefor. *Schlatre* v. *Greaud*, 19 La. Ann. 125. But the liability of the grantee does not discharge the grantor from his liability also to the mortgagee. *Meyer* v. *Lathrop*, 10 Hun, 66; *Calvo* v. *Davies*, 8 id. 222. Where he assumes the payment of a portion of the mortgage debts, as a part of the purchase-money, the amount so assumed becomes his personal debt. But the residue does not, although he may be compelled to pay the same to save his property. Hence a general payment, made by the purchaser on the mortgage debts, will be first applied to the portion for which he is personally liable. *Snyder* v. *Robinson*, 35 Ind. 311; 9 Am. Rep. 738. One who purchases premises covered by an undischarged mortgage, to secure the payment of notes, where he has knowledge of facts sufficient to put a prudent man on inquiry, and the mortgagee is well known and easily accessible to him, and when inquiry would have elicited information that the mortgage was still in force as between the original parties, cannot claim to be a purchaser without notice of the equities of the mortgagee, simply because the mortgagor has possession of and exhibits to him the notes described in the mortgage; such purchaser stands in no better position than the mortgagor himself. *Boxheimer* v. *Gunn*, 24 Mich. 372. A sale by the sheriff of property, without mentioning any mortgage, conveys a title subject to a mortgage, if the mortgage be a valid lien, and the sheriff is not a trespasser by such sale in general terms, though the property be subject to an incumbrance. But when the property is sold subject to an incumbrance, of course the purchaser cannot contest or deny the validity of the incumbrance. *Porter* v. *Parmley*, 52 N. Y. (7 Sick.) 185. A deed in the nature of a mortgage to secure the payment of certain enumerated debts creates an incumbrance on the whole property conveyed for the whole of the indebtedness secured. If the mortgagor sells a portion of the land thus incumbered to a purchaser who had constructive, though not actual, notice of the mortgage, and transfers the notes of the vendee for the purchase-money, to one of the mortgage creditors, to be applied to the reduction of the mortgage debts, the payment of such notes by the purchaser to one of the mortgage creditors does not release the land thus sold from the mortgage, unless it was so agreed between the purchaser and the parties to the mortgage. *Colby* v. *Cato*, 47 Ala. 247. A purchaser at a sale under a judgment, or mortgage which is a lien upon the equity of redemption merely, is presumed to bid only to

the value of such equity, and the land purchased is the primary fund to pay the amount due on the prior bond and mortgage. *Hanger* v. *State*, 27 Ark. 667. And on a sale under mortgage of a leasehold of a mill, and the machinery mentioned in the schedule attached, will pass other machinery put into the mill after the execution of the mortgage. *Ladley* v. *Creighton*, 70 Penn. St. 490.

If the mortgagee indulges the mortgagor for a consideration until he becomes insolvent, such indulgence will make good the title of a purchaser from the mortgagor; but if without any consideration he indulges him, such indulgence, unless the facts show fraud, will not relieve the title of the purchaser from the incumbrance of the mortgage. *Fry* v. *Shehee*, 55 Ga. 208.

The actual possession of land, by a purchaser holding a bond for a deed from his vendor, is notice of his rights to one taking a mortgage on the land from the vendor, and the mortgagee will take a lien only on the vendor's right. *Doolittle* v. *Cook*, 75 Ill. 354. On the death of a purchaser at a sale, made under a power contained in a mortgage, without having completed the purchase, his executors may pay the purchase-money, and take a deed to themselves as executors, in trust for the persons interested in the estate; and on the title conveyed by such a deed, they may recover in ejectment against the mortgagor. *Lewis* v. *Wells*, 50 Ala. 198. The purchaser at an irregular foreclosure sale obtains all the rights of the mortgagee, including the right of possession. *Hoffman* v. *Harrington*, 33 Mich. 392. And one, who has received the title to lands under an arrangement which in legal effect made his rights no more than those of a mortgagee, is not thereby precluded from becoming a purchaser at a chancery sale on the foreclosure by a third person of another mortgage, and holding the title like any other purchaser; and such a purchase would cut off all previous equities of the other party. *Moote* v. *Scriven*, 33 Mich. 500.

No authority to commit waste upon mortgaged premises will be implied from the object for which the property was purchased, nor from the price agreed to be paid. *Coggill* v. *Milburn Land Co.*, 25 N. J. Eq. 87. The purchaser of mortgaged premises at a sheriff's sale may avail himself of the defense of usury against a prior mortgage, although he purchased subject to that mortgage. *Warwick* v. *Marlatt*, 25 N. J. Eq. 188.

Where ten acres of growing wheat was mortgaged, and the mortgage duly recorded, and afterward the mortgagor, without the consent or knowledge of the mortgagee, harvested, threshed, removed and sold the wheat, and the purchaser converted it to his own use by mixing it with other wheat, the purchaser was held liable to the mortgagee, for the value of the wheat. *Duke* v. *Stricklund*, 43 Ind. 494.

ARTICLE VI.

REGISTRY, NOTICE AND PRIORITY.

Section 1. In general. Successive mortgages duly registered take effect, and avail as security in favor of their successive holders, according to their priority of registration. *Johnson* v. *Stagg*, 2 Johns. 510; *Parker* v. *Wood*, 1 Dall. 436; *Connoly* v. *Stewart*, 2 Bay, 509. And this is but carrying out the doctrine of the effect of notice in equity, the registration being constructive notice to all persons affected by it. *Grant* v. *Bissett*, 1 Caines' Cas. 112; *Doe* v. *Bank of Cleveland*, 3 McLean, 140.

The record and lien of a mortgage commences the moment it is left for record, indorsed by the recorder and entered upon the mortgage index. *Brookes' Appeal*, 64 Penn. St. 127; *Kessler* v. *State*, 24 Ind. 313. But the index to the record of a mortgage forms no part of the record, and is not essential to make the record effective to charge subsequent purchasers with notice. *Green* v. *Garrington*, 16 Ohio St. 548; *Speer* v. *Evans*, 47 Penn. St. 141. And the rule that priority of delivery to the recorder gives priority of lien is not affected by the fact that the supposed lien of a prior unrecorded mortgage is excepted from the covenants of warranty in a subsequent mortgage. *Bercaw* v. *Cockerill*, 20 Ohio St. 163. The function of the mortgage office and its record is to preserve mortgages, and it does not follow that a direction to record an act of donation in a book of donations creates and preserves a mortgage in favor of the donee, the wife. Mortgages, to be preserved and effective, as to third parties, must be registered in the books, and in the manner prescribed by the law for that purpose. *Succession of Cordeviolle* v. *Dawson*, 26 La. Ann. 534.

A lien for unpaid purchase-money attaches *eo instanti* upon a conveyance of lands, pursuant to an executory contract for their sale, and if a vendor at the time of the conveyance takes back a mortgage for such purchase-money, it is a part of an indivisible transaction, and the purchaser cannot give another lien which will take a priority to such mortgage. *Dusenbury* v. *Hulbert*, 59 N. Y. (14 Sick.) 541; *Bolles* v. *Carli*, 12 Minn. 113. And a purchase-money mortgage purposely destroyed before recording remains a valid and existing lien upon the lands as between the parties and all others claiming with notice; the destruction of the paper evidence does not annihilate the lien. *Sloan* v. *Holcomb*, 29 Mich. 153. Courts of equity, notwithstanding the recording act, will control and dispose of so much of the purchase-money of land as remains unpaid, so as to protect a previous *bona fide*

purchaser by an unrecorded mortgage, so far as this can be done without infringing upon the equitable rights of the subsequent purchaser or of third persons. *Wynn* v. *Carter*, 20 Wis. 107. A statutory provision that a mortgage by a vendee, to secure purchase-money, executed and delivered at the same time with the conveyance, shall be preferred to previous judgments against the vendee, applies only to a mortgage given to the vendor, and not to a mortgage given to a third party who has advanced the purchase money. *Heuisler* v. *Nickum*, 38 Md. 270. But it does apply to a mortgage given by a lessee for years to his lessor, simultaneously with the lease to secure future advances by the lessor. *Ahern* v. *White*, 39 Md. 409.

When a wife purchases real estate, pays the purchase-money, and enters into possession, but receives no deed of conveyance, her title is good as against a subsequent mortgagee. And it makes no difference whether the possession of the premises was the possession of the wife or husband. *Humphrey* v. *Moore*, 17 Iowa, 193. But where two mortgages of the same property, but to different mortgagees, were executed and delivered at the same time, each expressly stating that it was for part of the purchase-money, with the express understanding between the parties that they should be equal liens on the land, and neither entitled to priority over the other, but one is recorded prior to the other, and is afterward assigned to a *bona fide* purchaser without notice of the agreement, by force of the recording act such mortgage is entitled to priority in the hands of the assignee. *Greene* v. *Deal*, 4 Hun (N. Y.), 703.

When two or more mortgages are made simultaneously, and so connected with each other that they may be regarded as one transaction, they will be held to take effect in such order of priority and succession as shall best carry out the intention and secure the rights of all the parties. *Pomeroy* v. *Latting*, 15 Gray (Mass.), 435. So, of two mortgages executed at the same time to secure the payment of two notes maturing at different times, that is the prior lien which secures the payment of the note first falling due. *Isett* v. *Lucas*, 17 Iowa, 503. In Georgia two mortgages executed on the same day, though not at the same time of day, will share *pro rata* in the proceeds of the sale of the mortgaged property. *Russell* v. *Carr*, 38 Ga. 459. The recording of a deed absolute, made at the same time with a bond of defeasance, the latter not being recorded, is sufficient to affect a subsequent incumbrancer with notice of the transaction, and he cannot complain that the absolute conveyance on the record is shown to be only a mortgage which he is at liberty to redeem. *Young* v. *Thompson*, 2 Kan. 83.

When a mortgage is taken to secure a pre-existing debt, the mort-

gagee does not become a purchaser, in that sense which, being without notice of a pre-existing equity, would cause his title to prevail over that of the prior equitable claimant. *Willard* v. *Ramsburg*, 22 Md. 206; *Wells* v. *Morrow*, 38 Ala. 125; *Spurlock* v. *Sullivan*, 36 Tex. 511. So a legal title under an unrecorded deed is good as against a subsequent mortgagee who received his mortgage as security for or in payment of a precedent debt, and who surrendered no security or parted with no value. *Cary* v. *White*, 52 N. Y. (7 Sick.) 138; *Pancoast* v. *Duval*, 26 N. J. Eq. 445. So, too, where the mortgagee of the apparent interest of a partner, as tenant in common of property, purchased with partnership funds and used for partnership purposes, but conveyed to the partners as individuals, secures by such mortgage a precedent debt, without parting with any thing of value, his lien will be postponed to that of subsequent creditors or incumbrancers of the partnership, although he took without notice of the facts as to the title. *Hiscock* v. *Phelps*, 49 N. Y. (4 Sick.) 97.

A subsequent incumbrancer, chargeable with actual notice of a pre-existing imperfect mortgage, will in equity be postponed to it, and it is entirely unimportant whether the imperfection in the mortgage which would render it invalid and inoperative in a court of law arises from the fact that it was not properly acknowledged, or not duly recorded, or had not indorsed upon it an affirmation as to the nature of the consideration which is required by statute. *Johnston* v. *Canby*, 29 Md. 211. But a mortgage signed in blank and given to an agent, by whom it is afterward filled in and delivered, if admitted to be an equitable lien, cannot prevail over equitable rights of another who has also the legal title. *Fox* v. *Palmer*, 25 N. J. Eq. 416.

An equitable mortgage for a precedent debt has no equity superior to that of a valid subsequent judgment at law. Between such contestants the first perfected lien should prevail. But where the consideration of the mortgage is paid at the time it is given, equity regards the equitable mortgagee as a *bona fide* purchaser. *Wheeler* v. *Kirtland*, 24 N. J. Eq. 552.

The rights of subsequent creditors against defective or unrecorded mortgages will be protected, as well where the claim under such instruments is asserted in a court of equity, as in a court of law. *Sixth Ward Building Assoc.* v. *Willson*, 41 Md. 506. Proceedings to foreclose an unrecorded mortgage do not constitute such a *lis pendens* as would be notice to the purchaser of mortgaged property; the notice must be actual, such as would affect the conscience of the purchaser, and charge him with fraud. *Douglass* v. *McCrackin*, 52 Ga. 596.

If one who executes a mortgage upon lands to which he has no title,

with covenants of seizin and title, afterward acquires title, it inures to the benefit of the mortgagee, and a record of such mortgage, prior to the acquisition of title by the mortgagor, is constructive notice to a subsequent purchaser in good faith, and under the recording act gives it priority to his title. *Tefftt* v. *Munson*, 57 N. Y. (12 Sick.) 97.

Where mortgaged premises have been sold in parcels at different times, in the absence of any intervening equities, they will be resorted to in the inverse order of alienation. *McKinney* v. *Miller*, 19 Mich. 142. But this rule does not apply where the deed of alienation expressly subjects each tract to the incumbrance. The parcels are subjected *pro rata*. *Briscoe* v. *Power*, 47 Ill. 447.

§ 2. **Effect of registry.** The registration of a deed or mortgage operates as a constructive notice upon all subsequent purchasers of any estate, legal or equitable, in the same property. *Parkist* v. *Alexander*, 1 Johns. Ch. 394. But in order to have this effect, the instrument must be such as is authorized to be recorded, and the registry must have been made in compliance with the law, otherwise the registry is to be treated as a mere nullity, and it will not affect a subsequent incumbrancer or purchaser, unless he have such actual notice as would amount to a fraud. *Frost* v. *Beekman*, 1 Johns. Ch. 288; *Work* v. *Harper*, 24 Miss. 517. But an omission of the register to note the time of receiving the deed for record, or to enter it in the index or alphabet, will not invalidate the effect of the registration. *McLarren* v. *Thompson*, 40 Me. 284; *Curtis* v. *Lyman*, 24 Vt. 338. A deed noted for registration, though not actually recorded till subsequently to a prior deed, which was received for record after the second deed, will take precedence of such prior deed. *Ruggles* v. *Williams*, 1 Head, 141; *Dubose* v. *Young*, 10 Ala. 365; *Nichols* v. *Reynolds*, 1 R. I. 30; *Gill* v. *Fauntleroy*, 8 B. Monr. 177. But the recording of a subsequent mortgage is not notice to the prior subsequent mortgagee, as to rights vested under the prior mortgage. *Birnie* v. *Main*, 29 Ark. 591; *Hoy* v. *Bramhall*, 4 C. E. Green (N. J.), 563; *Iglehart* v. *Crane*, 42 Ill. 261. It will not operate as constructive notice of its existence to a first mortgagee, so as to impair the lien of the latter by his having executed, in good faith, a release, without notice of existing equities on the part of the former. *Ward* v. *Hague*, 25 N. J. Eq. 397. A mortgage fairly given to secure a *bona fide* creditor cannot be affected by a subsequent or even a cotemporaneous attempt to convey or incumber property so as to delay creditors. *Stillman* v. *Stillman*, 21 id. 126. A subsequent mortgage, if first recorded, will create a prior lien *only* where it is obtained and recorded in good faith, and without notice

of the prior mortgage; such notice, however, must be clearly proved. *Willard* v. *Ramsburg*, 22 Md. 206.

A mortgage given to secure future advances, duly registered, is good, not only as against the mortgagor, but is entitled to priority over subsequent incumbrances, for all advances made prior to notice of the subsequent incumbrance. But it must be an actual not a constructive notice. *Ward* v. *Cooke*, 2 C. E. Green (N. J.), 93; *Bissell* v. *Kellogg*, 60 Barb. 617. But where the advances are such as the one party is not bound to make, or the other to accept, no lien is created on the mortgaged premises as against a purchaser who puts his deed on record before such advances are in fact made. *Ladue* v. *Detroit, etc., R. R. Co.*, 13 Mich. 380; *Robinson* v. *Williams*, 22 N. Y. (8 Smith) 380.

An instrument executed and acknowledged in due form by the holders of the legal title to real estate, which recites the execution and recording of a mortgage on such property, the destruction of the record of the mortgage by fire, the re-establishment of the record according to law, and which admits a specific sum to be due on the mortgage, which sum the parties thereby agree to pay in installments, is itself a mortgage, and its recording is effectual to preserve the lien upon the property. *Hunt* v. *Innis*, 2 Woods, 103. If there be a separate registry for mortgages, the mortgage must be inscribed in it. *Fisher* v. *Tunnard*, 25 La. Ann. 179.

Where a mortgage and a conveyance of the same land is made on the same day, and the mortgage is recorded, but the conveyance is not, and the mortgage is subsequently foreclosed and a sheriff's deed executed to the purchaser, the grantee under the conveyance has no rights in the land which could be conveyed to a third party. *Ogden* v. *Walters*, 12 Kan. 282.

A covenant in the mortgage to keep the mortgaged premises insured for the benefit of the mortgagee creates a specific equitable lien upon the insurance money which is valid as against an assignee in bankruptcy. The mortgage being recorded, the covenant acts upon the insurance as soon as affected, runs with the land and is notice to creditors; and no subsequent assignment can affect the rights of the mortgagee. It is not necessary that the policies be assigned, nor that the mortgagee select the companies. And any acts of the mortgagor without the consent of the mortgagee will not defeat the effect of the covenant. *Re Sands Ale Brewing Co.*, 3 Biss. 175. An unsatisfied and recorded mortgage is valid against a subsequent purchaser of the mortgaged premises, to whom the mortgage was given at the time of the purchase, to take to the record office and have it canceled, the mort-

gage having come into the mortgagor's hands, without the consent of the mortgagee, and being unaccompanied by the bond it was given to secure. *Harrison* v. *N. J. R. R., etc., Co.*, 4 C. E. Green, 488.

§ 3. **Priority between mortgages.** As between two mortgages the one first recorded is the prior lien. *Ripley* v. *Harris*, 3 Biss. 199; *Goelet* v. *McManus*, 1 Hun (N. Y.), 306; *Odd Fellows' Sav. Bank* v. *Banton*, 46 Cal. 603. A mortgagee whose deed has not been registered, or has been registered on a defective probate, has no priority over any other creditor. *Henderson* v. *McGhee*, 6 Heisk. (Tenn.) 55. When a mortgagee causes his mortgage to be recorded, he has done all that is required of him to preserve his lien; and all persons purchasing from the mortgagor subsequently are bound at their peril to take notice of the mortgage. *Rice* v. *Dewey*, 54 Barb. 455; *Palmer* v. *Palmer*, 48 Vt. 69; *Humphreys* v. *Newman*, 51 Me. 40; *Chadwick* v. *Turner*, L. R., 1 Ch. 310. Subsequent creditors cannot complain of the transaction being fraudulent, unless they can show that the object and intention of the conveyance was to perpetrate a fraud, and avoid subsequent indebtedness. *Hickman* v. *Perrin*, 6 Coldw. (Tenn.) 135; *Routh* v. *Spencer*, 38 Ind. 393. But a mortgagee, who takes his mortgage with knowledge of a prior lien, not recorded, will not be permitted, by placing his mortgage on record first, to gain priority over the earlier lien. *Matthews* v. *Everitt*, 23 N. J. Eq. 473; *Verges* v. *Prejean*, 24 La. Ann. 78; *Butler* v. *Viele*, 44 Barb. 166. His mortgage will be postponed in favor of such prior mortgage in such case even in the hands of his assignee without notice. *Conover* v. *Van Mater*, 3 Green (N. J.), 481; *Nice's Appeal*, 54 Penn. St. 200.

Priority of record will not give preference to one mortgage over another given at the same time, and held by the same person. Such mortgages in the hands of assignees are concurrent liens, payable ratably out of the proceeds of the mortgaged premises, after payment of costs of both. *Gansen* v. *Tomlinson*, 23 N. J. Eq. 405. But the priority of two independent mortgages is generally determined by the dates of their registry. *Peychaud* v. *Citizens' Bank*, 21 La. Ann. 262; *Harrington* v. *Allen*, 48 Miss. 493; *Boyce* v. *Shiver*, 3 S. C. 515.

Where a husband and wife execute several mortgages of the husband's land to different persons, and she executes them at different dates, the mortgage she first executes will have priority as to her interest in the land, in case she survives the husband. *Hoadley* v. *Hadley*, 48 Ind. 452. And where the mortgagee transferred the note secured by the mortgage, and afterward purchased the mortgaged property, upon which, after entering satisfaction of the mortgage, he executed a second to secure a party who had no notice that the note

was unpaid, it was held that the lien of the second mortgage was superior to the first. *Bowling* v. *Cook*, 39 Iowa, 200.

§ 4. **Priority between debts secured by the same mortgage.** Different notes secured by the same mortgage are to be paid from the mortgage fund in the order in which they become due. And it makes no difference that the notes secured by mortgage were negotiable. Nor will the priority of assignment change the order of appropriation. *The Bank of the United States* v. *Covert*, 13 Ohio, 240; *Murdock* v. *Ford*, 17 Ind. 52; *Marine Bank* v. *International Bank*, 9 Wis. 57.

Where a debtor executes several notes to his creditor, and gives a deed of trust to secure their payment, and the first note being duly paid, the creditor assigns the second note to a third person, without assigning the deed of trust, and then assigns the third note to another person, together with the deed of trust, the assignee of the second note is entitled to the first satisfaction out of the trust fund. *Gwathmeys* v. *Ragland*, 1 Rand. (Va.) 466.

Where a mortgage was executed for the purpose of securing the payment of all and every sum or sums of money then owing, or which might thereafter become due and owing from the mortgagor to the mortgagee, upon any note or notes negotiated or to be negotiated with the mortgagee, of which the mortgagor might be either drawer or indorser or otherwise however, and, upon sale of the mortgaged premises, the proceeds being insufficient to pay a note of the mortgagor's to the mortgagee, for which the latter had no other security than the mortgage, it was held that an accommodation indorser on a note of the mortgagors, discounted by the mortgagee after the execution of the mortgage and before the sale, could not claim a ratable distribution of the fund on both notes. *Union Bank of Maryland* v. *Edwards*, 1 Gill & J. (Md.), 346.

§ 5. **Priority between mortgages, judgments, attachments, executions, etc.** In some States a docketed judgment is preferred to a prior unregistered mortgage. *Friedley* v. *Hamilton*, 17 S. & R. 70; *Uhler* v. *Hutchinson*, 23 Penn. St. 110; *Davidson* v. *Cowan*, 1 Dev. Eq. 470. If the priority cannot be determined they will share *pro rata*. *Hendrickson's Appeal*, 24 Penn. St. 363. In other States a prior unrecorded mortgage takes precedence of a judgment lien under which no sale has been made. *Hays* v. *Thode*, 18 Iowa, 51; *Knell* v. *Building Assoc.*, 34 Md. 67. But in the absence of actual notice an unrecorded mortgage is void, as against a purchaser at a sale under execution against the mortgagor. *Barker* v. *Bell*, 37 Ala. 354;

Jackson v. *Dubois*, 4 Johns. 216; *Hampton* v. *Levy*, 1 McCord's Ch. 107.

In Maine a levy takes precedence of a mortgage recorded the day after the time named when the officer "seized and took" the land in execution. *French* v. *Allen*, 50 Me. 437. In Kansas a mortgagee holding under a mortgage which misdescribes the premises intended to be conveyed, holds a prior lien to one holding under an execution, issuing under a judgment recovered subsequent to the execution of the mortgage. *Swarts* v. *Stees*, 2 Kans. 236.

Upon foreclosure of a mortgage, the amount paid at a tax sale by one claiming under the tax sale and interest will form a lien prior to the mortgage. The land will be decreed to be sold free from the lien for taxes, and the purchaser at the tax sale will be paid first. *Campbell* v. *Dewick*, 20 N. J. Eq. (5 C. E. Gr.) 186. Under the Pennsylvania act, liens, the existence of which prior to a mortgage will cause it to be divested by a sheriff's sale, must be such as are themselves divested by the sale and thrown upon the fund. *Helfrich* v. *Weaver*, 61 Penn. St. 385.

The service of an attachment upon mortgaged premises, after the execution and delivery of a mortgage, but before it is recorded, creates no lien upon the prior estate of the mortgagee, if the mortgage is recorded before judgment under the attachment. *Campion* v. *Kille*, 1 McCarter (N. J.), 229; S. C., 2 id. 476. But a creditor, by attaching property in the possession of his debtor, acquires a specific lien on his interest, and is entitled, like a judgment creditor, to impeach the colorable title of a fraudulent mortgagee. *Frost* v. *Mott*, 34 N. Y. (7 Tiff.) 253. A mortgage which was a subsisting incumbrance upon premises, on which a mechanic's lien is claimed, when the premises were purchased by the defendant, is a prior incumbrance to the liens of the mechanics and material-men, both upon the land and upon the buildings which were then upon it. *Morris, etc., Bank* v. *Rockaway, etc., Co.*, 1 McCarter (N. J.), 189; *Hazard Powder Co.* v. *Loomis*, 2 Disney (Ohio), 544.

Where an owner mortgaged land on which a widow's interest was secured, and a judgment was afterward obtained against him on which the land was sold, neither the arrears of interest on the widow's charge, nor the mortgage, was divested by the sale. *Wertz's Appeal*, 65 Penn. St. 306.

Where a mother conveys premises to her son in fee, taking back a life lease and remaining in possession, but before her lease is recorded her son gives a mortgage of the premises to one who has made reason-

able inquiries for liens without obtaining knowledge of the lease, the mortgage is a prior lien. *Staples* v. *Fenton*, 5 Hun, 172.

§ 6. **Tacking mortgages, etc.** In England there is a doctrine in relation to mortgages, by which if there were, for instance, three successive mortgages without notice, upon the same estate to three different persons, and the third acquires the first mortgage by assignment, he may hold the estate against the second, until he shall have paid both the first and the third. This is called "tacking" of mortgages, and rests upon the idea that the equities of the parties are all equal, and the first being in possession shall not be obliged to give up his legal right of possession till his whole charge upon the estate is satisfied. Wms. Real Prop. 361; 3 Washb. Real Prop. 540. But in this country, this doctrine is wholly superseded by the principle of registration, whereby the record of a prior mortgage is constructive notice to all parties of its existence. *Grant* v. *U. S. Bank*, 1 Cai. (N. Y.) Cas. 112; *Wing* v. *McDowell*, Walk. (Mich.) 175; *Chandler* v. *Dyer*, 37 Vt. 345. If it is not recorded and the second has no notice of it in fact, his own takes precedence of the prior one. *Humphreys* v. *Newman*, 51 Me. 40; *McKinstry* v. *Mervin*, 3 Johns. Ch. 466; *Averill* v. *Guthrie*, 8 Dana, 82; *Green* v. *Tanner*, 8 Metc. 411.

A prior mortgagee cannot tack his debts against the mortgagor, not included in the mortgage, to his prior mortgage, to the injury of a subsequent mortgagee. *Siter* v. *McClanachan*, 2 Gratt. (Va.) 280; *Hughes* v. *Worley*, 1 Bibb (Ky.), 200; *Chase* v. *McDonald*, 7 Harr. & J. (Md.) 160.

When a creditor, whose debt is secured by the assignment of a mortgage, purchases a judgment which constitutes a prior lien on the mortgaged premises, at the request of his debtor, and with the express understanding that it shall be tacked to the mortgage, and paid out of the fund, he is entitled, in equity, to have it tacked to his mortgage, and paid out of the fund. *Cullum* v. *Branch Bank at Mobile*, 23 Ala. 798.

Though a creditor cannot tack a debt not secured by mortgage to an existing mortgage debt, so as to make the former a charge upon the land, nor a subsequent mortgage to a prior one, against an intervening incumbrance, yet a mortgagee may take another mortgage which will be valid against an intervening incumbrance implied by equity of which the mortgagee had neither actual nor constructive notice. *Orvis* v. *Newell*, 17 Conn. 97.

The purchase-money of land unpaid is a lien on the land where no conveyance has been made of it, unless there is evidence that the land was not looked to, or such lien has been abandoned. If, there-

fore, a conveyance is to be made when the purchase-money is paid, the vendor has a lien on the land for the purchase-money ; and if the vendee mortgages the premises to a third person, and such person pay the purchase-money, he may tack the money paid to the sum due on the mortgage. *Henderson* v. *Stewart*, 4 Hawks (N. C.), 256.

As to foreclosure, see *ante*, Vol. 3, 407.

CHAPTER C.

MUNICIPAL CORPORATIONS.

TITLE I.

OF MUNICIPAL CORPORATIONS GENERALLY.

ARTICLE I.

OF THEIR NATURE IN GENERAL.

Section 1. Definition and nature. According to the doctrine of the common law, a corporation aggregate for municipal purposes is nothing more nor less than "an investing the people of a place with the local government thereof." *Cuddon* v. *Eastwick*, 1 Salk. 192; *People* v. *Morris*, 13 Wend. 325, 334; *People* v. *Hurlbut*, 24 Mich. 44, 88; *Brickerhoff* v. *Board of Education*, 37 How. (N. Y.) 499; S. C., 2 Daly, 443. Or, it is an agency to regulate and administer the internal concerns of a locality in matters peculiar to the place incorporated, and not common to the State or people at large; and both the persons and the place inhabited by them are indispensable to the constitution of such a corporation. 1 Dill. Mun. Corp., § 9 b; *New Orleans, etc., R. R. Co.* v. *City of New Orleans*, 26 La. Ann. 478. The corporation is the artificial body created by the law; and even the council, or other legislative or governing body, constitutes, neither *the* corporation, nor in themselves *a* corporation. *Reg.* v. *York*, 2 Q. B. 847, 850; *Reg.* v. *Paramore*, 10 Ad. & El. 286; *Harrison* v. *Williams*, 3 B. & C. 162. Nor are municipal corporations established for the exclusive advantage of the corporators, but they are created and exist for the benefit of the public at large. *Police Jury* v. *Shreveport*, 5 La. Ann. 661, 664; *Herbert* v. *Benson*, 2 id. 770; *Jameson* v. *People*, 16 Ill. 257. See, also, *Lowber* v. *Mayor, etc., of New York*, 5 Abb. Pr. (N. Y.) 325; *Clarke* v. *City of Rochester*, 14 How. (N. Y.) 193; S. C., 24 Barb. 446; 5 Abb. Pr. 107.

All corporations intended as agencies in the administration of civil government are *public*, as distinguished from *private* corporations;

but all public corporations are not municipal corporations. A distinction is made between municipal corporations *proper*, as incorporated villages, towns and cities, and other public corporations, such as counties and *quasi* corporations. See 1 Dill. on Mun. Corp., § 10. The former are called into existence, either at the direct solicitation or by the free consent of the persons composing them, for the promotion of their own local and private advantage and convenience; while the latter are, at most, but local organizations, which, for the purposes of civil administration, are invested with a few functions characteristic of a corporate existence. *Hamilton County* v. *Mighels*, 7 Ohio St. 109, 115. See, also, *Ward* v. *County of Hartford*, 12 Conn. 406; *Harris* v. *School District*, 28 N. H. 58; *Parsons* v. *Goshen*, 11 Pick. 396; *Schriffer* v. *Saum*, 81 Penn. St. 385.

So, municipal corporations proper, as ordinarily constituted, are generally regarded as being possessed of a double character—the one *public*, the other *private*. Thus, in speaking of powers granted to a municipal corporation, Justice Nelson remarks, that "regard should be had, not so much to the nature and character of the various powers conferred, as to the object and purpose of the legislature in conferring them. If granted for public purposes exclusively, they belong to the corporate body in its public, political, or municipal character. But, if the grant was for purposes of private advantage, or emolument, though the public may derive a common benefit therefrom, the corporation, *quo ad hoc*, is to be regarded as a private company. It stands on the same footing, as would any individual, or body of persons, upon whom like special franchises had been conferred." *Bailey* v. *Mayor, etc., of New York*, 3 Hill, 531. See, also, *Western Saving Fund Society* v. *City of Philadelphia*, 31 Penn. St. 175, 185; *New Orleans, etc., R. R. Co.* v. *City of New Orleans*, 26 La. Ann. 478; *Board of Park Commissioners* v. *Common Council of Detroit*, 28 Mich. 228; S. C., 15 Am. Rep. 202; *De Voss* v. *Richmond*, 18 Gratt. (Va.) 338; *Weightman* v. *Washington*, 1 Black (U. S.), 39; *Western College* v. *Cleveland*, 12 Ohio St. 375. And the distinction is well established between the responsibilities of towns and cities for acts done in their *public capacity*, in the discharge of duties imposed on them by the legislature for the public benefit, and for acts done in what may be called their *private character*, in the management of property and rights voluntarily held by them for their own immediate profit or advantage, as a corporation, although inuring, of course, ultimately to the benefit of the public. *Fisher* v. *Boston*, 104 Mass. 87; S. C., 6 Am. Rep. 196; *Maxmilian* v. *Mayor of New York*, 62 N. Y. (17 Sick.) 160; 20 Am. Rep. 468; *Detroit* v. *Corey*, 9 Mich. 165; *Mead* v.

New Haven, 40 Conn. 72; S. C., 16 Am. Rep. 14. And see *post*, 631, art. 4. But, on the other hand, the distinction taken between the public and the private functions of municipal corporations has been declared unsatisfactory by high authority (see Dill. on Mun. Corp., § 39, note 1); and it has been maintained that such corporations are altogether public, and all their rights and powers public in their nature, and that their property, though held for income or sale, and unconnected with any use for the purposes of the municipal government, is under the control of the legislature, and not within the provisions of the constitution protecting private property. *Darlington* v. *Mayor, etc., of New York*, 31 N. Y. (4 Tiff.) 164. And see *Barnes* v. *District of Columbia*, 1 Otto (U. S.), 540.

§ 2. **Power to create.** In England, until a comparatively recent period, both public and private corporations were created by royal prerogative, without the intervention of parliament, and were invested with such powers and privileges as favorites might ask or the public good be supposed to require. See *Robinson* v. *Jones*, 14 Fla. 256. But all municipal corporations in England are now regulated by the municipal corporation act (Stat. of 5 & 6 Will. 4, c. 76), as altered and amended by subsequent acts. This statute empowers the crown to incorporate any town in accordance with its provisions, on the presentation of a petition by its inhabitants. See 1 Broom & Had. Com. (Wait's ed.) 415. And this power is not necessarily taken away by the fact of a second petition against the incorporation being presented by a larger number of inhabitants. *Rutter* v. *Chapman*, 8 M. & W. 1.

In this country, the power to create corporate bodies for municipal purposes, with the means of self-government, is a legitimate exercise of sovereignty, belonging to the legislative power of a State. *Hope* v. *Deaderick*, 8 Humph. (Tenn.) 1; *Herzo* v. *San Francisco*, 33 Cal. 134; *McPherson* v. *Foster*, 43 Iowa, 48; 22 Am. Rep. 215; *Mayor of Mobile* v. *Moog*, 53 Ala. 561. Formerly, this power was exercised in the creation of such corporations singly, each with its special or separate charter. But latterly the legislatures of many of the States have followed the example of the English Municipal Corporation Act above noticed, and have passed general acts for the incorporation, regulation, and government of municipal corporations. See *Thomas* v. *Ashland*, 12 Ohio St. 124; *State* v. *Jennings*, 27 Ark. 419; *Johnson* v. *Common Council*, 16 Ind. 227. The constitutions of some of the States expressly require the legislature to provide a general law for all corporations, public and private. See Id.; *Von Phul* v. *Hammer*, 29 Iowa, 222; *Wyandotte City* v. *Wood*, 5 Kans. 603; *State* v. *Dousman*,

28 Wis. 541; *Welker* v. *Potter*, 18 Ohio St. 85; while in other States, the legislature is allowed to create corporations for municipal purposes by special act. See *Virginia City* v. *Mining Co.*, 2 Nev. 86; *Tierny* v. *Dodge*, 9 Minn. 171; *Oroville, etc., R. R. Co.* v. *Plumas Co.*, 37 Cal. 354; *Bank of Chenango* v. *Brown*, 26 N. Y. (12 Smith) 467; *City of St. Louis* v. *Shields*, 62 Mo. 247.

§ 3. **Extent of legislative control.** The special powers conferred upon public or municipal corporations are not vested rights as against the State, but being wholly political, exist only during the will of the general legislature. The power of the legislature over such corporations is supreme and transcendent; it may erect, change, divide and even abolish them at pleasure, as it deems the public good to require. *Groff* v. *Mayor, etc.*, 44 Md. 67; *United States* v. *Railroal Company*, 17 Wall. 322; *Barnes* v. *District of Columbia*, 1 Otto (U. S.), 540; *Allen* v. *McKeen*, 1 Sumn. 276; *People* v. *Morris*, 13 Wend. 325; *Pye* v. *Peterson*, 45 Tex. 312; *Philadelphia* v. *Fox*, 64 Penn. St. 169; *Sloan* v. *State*, 8 Blackf. (Ind.) 361; *Clinton* v. *Cedar Rapids, etc., R. R. Co.*, 24 Iowa, 455; *Mayor, etc., of Hagerstown* v. *Sehner*, 37 Md. 180. But see *People* v. *Batchellor*, 53 N. Y. (8 Sick.) 128; 13 Am. Rep. 480. And see *ante*, 595, § 1. So, the rule is held to be subject to the limitation that the legislature cannot direct an act which will impair the obligation of a contract. *San Francisco* v. *Canavan*, 42 Cal. 541; *City* v. *Shields*, 52 Mo. 351; *Milner* v. *City of Pensacola*, 2 Woods (C. C.), 632; *Richland County* v. *Lawrence County*, 12 Ill. 1. Thus, if a municipal corporation becomes indebted, it is clear that the rights of the creditors cannot be impaired by any subsequent legislative enactment. *Brooklyn Park Commissioners* v. *Armstrong*, 45 N. Y. (6 Hand) 234; 6 Am. Rep. 70; *Furman* v. *Nichol*, 8 Wall. 44; *Lansing* v. *County Treasurer*, 1 Dill. (C. C.) 522; *State* v. *Milwaukee*, 25 Wis. 122.

The legislature has undoubted power to enlarge the territorial limits of a city, and thereby to render subject to the city ordinances the persons dwelling upon the land so added, even without their consent. *City of St. Louis* v. *Allen*, 13 Mo. 400; *McCallie* v. *Chattanooga*, 3 Head (Tenn.), 317. To extend the boundaries of a city does not take private property for public purposes without compensation, although tax payers of the added territory, by the act, are subjected to liability for the city debt and taxes, and the tax payers of the county from whom the addition to the city was taken lose the contributions of those withdrawn by the act. *Wade* v. *Richmond*, 18 Gratt. (Va.) 583.

The incorporation of a part of a town into a city was held not to divest the title of the town to a tract of land owned by it in fee simple,

"in trust, for the use of the town, however." *Milwaukee* v. *Milwaukee*, 12 Wis. 93.

§ 4. **Rights of corporations or citizens.** It is the citizens of a city, and not the common council, who constitute the "corporation" of the city. The aldermen and other charter officers are only *officers* of the corporation. *Clarke* v. *City of Rochester*, 24 Barb. 446; S. C., 14 How. 193; 5 Abb. Pr. 107; *Lowber* v. *Mayor, etc., of New York*, 5 id. 325.

Any corporator may, at the common law, have a *mandamus* to compel the custodian of corporate records and documents to allow him an inspection of them. *Rex* v. *Babb*, 3 Term R. 580; *Harrison* v. *Williams*, 3 B. & C. 162. But, to entitle himself to the aid of the court, he must show a proper demand by him upon such custodian at a proper time and place, and for a proper reason, which has been refused; the party asking must also have some interest at stake, rendering the inspection necessary. Id.; *People* v. *Walker*, 9 Mich. 328; *People* v. *Cornell*, 35 How. 31. *Ante*, 358.

Individual corporators may likewise enjoin the sale of a public place for the purpose of erecting private buildings. They can prevent the building of what they might destroy, if already erected. *Xiques* v. *Bujac*, 7 La. Ann. 498.

ARTICLE II.

CHARTERS AND THEIR NATURE.

Section 1. In general. The charter is the organic act which gives to the corporation both its existence and its peculiar character. No particular form of words is necessary, in order to create a corporation, and the omission in the charter or act of incorporation of the words "to plead and be impleaded," or "to have a seal," or "to make by-laws," would not render it essentially defective. 1 Kyd's Corp. 63; *Conservators of River Tone* v. *Ash*, 10 B. & C. 349. Nor would it be rendered essentially defective by the omission of the name, provided the name could be ascertained from the terms of the charter or act, or from the nature of the things or matters granted. *School Commissioners* v. *Dean*, 2 Stew. & P. (Ala.) 190; *Trustees, etc.*, v. *Parks*, 10 Me. 441. The *mode* of perpetuating the existence of a corporate body is not essential; all that is essential is that some mode be provided by the charter or act by which it is constituted, or by the general laws of the government, by means of which it shall be so perpetuated. *Overseers of Poor* v. *Sears*, 22 Pick. 122, 130. See, also, *Stebbins* v. *Jennings*, 10 id. 172; *Bow* v. *Allenstown*, 34 N. H. 351; *Mahoney* v. *Bank of the State*, 4 Ark. 620; *Thomas* v. *Dakin* 22 Wend. 9, 84.

The courts are bound to take judicial notice of the charter or incorporating act of a municipal corporation without being specially pleaded. *Case* v. *Mayor of Mobile*, 30 Ala. 538; *People* v. *Potter*, 35 Cal. 110; *Clapp* v. *Hartford*, 35 Conn. 66; *Prell* v. *McDonald*, 7 Kan. 426; S. C., 12 Am. Rep. 423; *State* v. *Mayor, etc., of Murfreesboro'*, 11 Humph. (Tenn.) 217.

§ 2. **Amendment or repeal of charter.** The powers conferred upon public corporations, created for municipal purposes, may at any time be altered or repealed by the legislature, either by a general law operating upon the whole State, or in the absence of a constitutional restriction, by a special act. *Sloan* v. *State*, 8 Blackf. (Ind.) 361. See, also, *State* v. *The Mayor*, R. M. Charlt. (Ga.) 250; *Smith* v. *Adrian*, 1 Mich. 495; *Lynch* v. *Lafland*, 4 Coldw. 96; *Girard* v. *Philadelphia*, 7 Wall. 1. But where a statute does not, in express terms, annul a right or power given to a corporation by a former act, but only confers the same rights and powers upon it under a new name, and with additional powers, the latter does not repeal the former. *State* v. *Mayor of Mobile*, 24 Ala. 701. And see *State* v. *Branin*, 23 N. J. Law, 484; *Trustees of Erie Academy* v. *City of Erie*, 31 Penn. St. 515. Neither the identity of a municipal corporation, nor its right to hold property devised to it, is destroyed by a change of its name, an enlargement of its area, or an increase in the number of its corporators. And these are changes which the legislature has power to make. *Girard* v. *Philadelphia*, 7 Wall. 1.

A repeal of a law by implication is not favored. *Hume* v. *Gossett*, 43 Ill. 297. And the cases are numerous in which special laws, conferring particular rights upon municipal corporations, were held not to be repealed by subsequent statutes, general in their character. See *In re Goddard*, 16 Pick. 504; *Bond* v. *Hiestand*, 20 La. Ann. 139; *State* v. *Morristown*, 33 N. J. Law, 57; *Mayor of Cumberland* v. *Magruder*, 34 Md. 381; *Louisville* v. *Kean*, 18 B. Monr. (Ky.) 9. The earliest statute continues in force, unless the two are clearly inconsistent with, and repugnant to each other, or unless in the latest statute, some express notice is taken of the former, plainly indicating an intention to repeal it. *Kinney* v. *Mallory*, 3 Ala. 626 *Planters' Bank* v. *State*, 6 Sm. & M. (Miss.) 628; *Hankins* v. *Mayor of New York*, 64 N. Y. (19 Sick.) 18. An act empowering the president and trustees of incorporated towns to grant licenses, and requiring them to pay all moneys derived from this source into the county treasury, was held not to repeal special laws previously passed empowering particular corporations to grant licenses, and to retain moneys so obtained for their

own use. *Town of Ottawa* v. *County of La Salle*, 12 Ill. 339. See *Palmer* v. *State*, 2 Oreg. 66; *Burchard* v. *State*, id. 78.

§ 3. **Acceptance of charter.** The rule which applies in the case of private corporations, that the act is ineffectual until it is accepted by the corporators, has no application in the case of public corporations of a municipal character. Municipal corporations are absolutely created by the act of incorporation, without the acceptance of the people, or any act on their part, unless otherwise provided by the act. *Berlin* v. *Gorham*, 34 N. H. 266; *Mills* v. *Williams*, 11 Ired. (N. C.) 558; *Warren* v. *Charlestown*, 2 Gray, 104; *Gorham* v. *Springfield*, 21 Me. 58; *People* v. *Wren*, 4 Scam. (Ill.) 269.

§ 4. **Constitutionality of provisions of.** It is, however, well settled, that a provision in a municipal charter, requiring the assent or acceptance of a majority of the inhabitants to render it effectual, is not unconstitutional. *Alcorn* v. *Hamer*, 38 Miss. 652; *People* v. *Salomon*, 51 Ill. 53; *Smith* v. *McCarthy*, 56 Penn. St. 359. So, a provision in the charter of a municipal corporation by which the right to make certain improvements, or to create certain liabilities, is made to depend upon a vote of the people interested, has been upheld as valid. *St. Louis* v. *Alexander*, 23 Mo. 483; *Hammond* v. *Haines*, 25 Md. 541; *Trustees* v. *Cherry*, 8 Ohio St. 564. And the fact that the charter of a municipal corporation provides that the question of the absolute prohibition of the sale of intoxicating liquors is to be submitted to a vote of the incorporators does not invalidate the act. *Village of Gloversville* v. *Howell*, 7 Hun (N. Y.), 345. While only general statutes can be enacted by the legislature, yet it is well settled that the power to make local regulations, having the force of law in limited localities, may be committed to the people of those districts themselves. Id.; *Bank of Chenango* v. *Brown*, 26 N. Y. (12 Smith) 467. And see *State* v. *Morris Common Pleas*, 12 Am. Law. Reg. (N. S.) 32.

Where a public act has been legally adopted by a city in accordance with its provisions, a subsequent amendatory act needs no such adoption, unless its provisions expressly require it. *Swett* v. *Sprague*, 55 Me. 190.

§ 5. **Construction of charter.** It is a well-established principle, that municipal corporations can exercise no powers but those which are conferred upon them by the act by which they are constituted, or such as are necessary to the exercise of their corporate powers, the performance of their corporate duties, and the accomplishment of the purposes of their association. *Spaulding* v. *Lowell*, 23 Pick. 71; *Clark* v. *Davenport*, 14 Iowa, 494; *Le Couteulx* v. *Buffalo*, 33 N. Y. (6 Tiff.) 333; *Leavenworth* v. *Norton*, 1 Kan. 432; *Douglass* v. *Placerville*, 18

Cal. 643; *New London* v. *Brainard*, 22 Conn. 552; *Petersburg* v. *Metzker*, 21 Ill. 205; *Williams* v. *Davidson*, 43 Tex. 1; *Johnston* v. *Louisville*, 11 Bush (Ky.), 527. Being special grants of power, the charters of such corporations are to be strictly construed (Id.; *Leonard* v. *Canton*, 35 Miss. 189; *Wallace* v. *San Jose*, 29 Cal. 180); and any ambiguity or doubt arising out of the terms used by the legislature must be resolved in favor of the public. *Minturn* v. *Larue*, 23 How. (U. S.) 435. See, also, *Collins* v. *Hatch*, 18 Ohio, 523; *Lafayette* v. *Cox*, 5 Ind. 38. On the other hand, powers expressly granted, or necessarily implied, are not to be defeated or impaired by a stringent construction. *Kyle* v. *Malin*, 8 id. 34, 37. And in construing statutes applicable to public corporations, courts will attach no slight weight to the uniform practice or usage under them, if this practice has continued for a considerable length of time. *Sherwin* v. *Bugbee*, 16 Vt. 439. See *Hood* v. *Lynn*, 1 Allen, 103; *Frazier* v. *Warfield*, 13 Md. 279.

ARTICLE III.

OF THEIR CORPORATE POWERS.

Section 1. To make contracts generally. A municipal corporation, like a trading one, may, unless in some way restrained by charter, enter into any contract necessary to enable it to carry out the powers conferred upon it, such as incurring debts, executing and giving promissory notes, and adopting all the ordinary or usual means which may be necessary to the full exercise, enjoyment, and discharge of its powers expressly given. *City of Galena* v. *Corwith*, 48 Ill. 423; *Ketchum* v. *City of Buffalo*, 14 N. Y. (4 Kern.) 356; *Douglass* v. *Virginia City*, 5 Nev. 147; *McPherson* v. *Foster*, 43 Iowa, 48; 22 Am. Rep. 215; *Bateman* v. *Mayor of Ashton-under-Lyne*, 3 Hurlst. & N. 322; *Williamsport* v. *Commonwealth*, 84 Penn. St. 487. But no contract can, of course, be made by a corporation which is prohibited by its charter or by the statute law of the State. *Thomas* v. *City of Richmond*, 12 Wall. 349; *City of Jackson* v. *Bowman*, 39 Miss. 671. And all persons contracting with a municipal corporation must, at their peril, inquire into the power of the corporation or its officers to make the contract. See *Hodges* v. *City of Buffalo*, 2 Denio, 110; *Baltimore* v. *Reynolds*, 20 Md. 1; *Wallace* v. *San Jose*, 29 Cal. 180; *Schumm* v. *Seymour*, 24 N. J. Eq. 143; *City Council of Montgomery* v. *Plank Road Company*, 31 Ala. 76; *City of Leavenworth* v. *Rankin*, 2 Kan. 357. A contract beyond the scope of the corporate power is void, although the seal of the corporation is attached thereto. Id. So, where

the agent of a municipal corporation acts under special or express authority, whether written or verbal, the party dealing with him is bound to know, at his peril, what the power of the agent is, and to understand its legal effect, and if the agent exceeds the boundary of his legal powers, the act, so far as it concerns the corporation, is void. *Mayor, etc., of Baltimore* v. *Reynolds*, 20 Md. 1. See, also, *Supervisors, etc.* v. *Bates*, 17 N. Y. (3 Smith) 242; *Hague* v. *City of Philadelphia*, 48 Penn. St. 527; *Ramsay* v. *Western District Council*, 4 U. C. Q. B. 374.

When the act of incorporation prescribes the *mode* of contracting, that mode must be pursued, or the contract will not bind the corporation. *Leavenworth* v. *Rankin*, 2 Kans. 357; *Bladen* v. *City of Philadelphia*, 60 Penn. St. 464; *Butler* v. *Charlestown*, 7 Gray, 12; *Trustees of Paris Township* v. *Cherry*, 8 Ohio St. 564. But if no mode be prescribed, the body corporate, within the compass of its powers, may enter into contracts, just as a natural person may make like contracts. Thus, the contracts of a municipal corporation need not be under seal, or in writing, unless the statute of incorporation or some by-law of the corporate body so requires. *City of Selma* v. *Mullen*, 46 Ala. 411. And where the charter contemplates the business of the corporation to be transacted by a special body, the acts of such a body, evidenced by a written vote, are as completely binding upon the corporation, and as complete authority to their agents, as the most solemn acts done under the corporate seal. *Fleckner* v. *United States Bank*, 8 Wheat. 338. And see *Alton* v. *Mulledy*, 21 Ill. 76; *Abbey* v. *Billups*, 35 Miss. 618; *Baker* v. *Johnson County*, 33 Iowa, 151; *Detroit* v. *Jackson*, 1 Doug. (Mich.) 106; *Logansport* v. *Blakemore*, 17 Ind. 318.

Where duly appointed officers or agents, acting within the scope of their authority, execute an instrument on behalf of a corporation, signing their own names and affixing their own seals, such seals are merely nugatory, and the instrument is to be regarded as a simple contract, and, if otherwise valid, binding on the corporation as such. *Regents of University* v. *Detroit Young Men's Society*, 12 Mich. 138; *Blanchard* v. *Blackstone*, 102 Mass. 343; *Burrill* v. *Boston*, 2 Cliff. (C. C.) 590; *Heidelbery School District* v. *Horst*, 62 Penn. St. 301.

So, a contract is entered into between two corporations, when one of them by some proper action proposes terms to the other, and this other, a municipal corporation, thereupon passes an ordinance embracing them; and it cannot be objected to such a contract that it is not signed by the party to be charged, or that the ordinance is nothing more than a declaration of intention. *People* v. *San Francisco*, 27 Cal. 655.

The power of the legislature to ratify a contract entered into by a municipal corporation for a public purpose, which is *ultra vires*, results

from its power to have originally authorized the very contract which was made. *Brown* v. *Mayor*, 63 N. Y. (18 Sick.) 239.

But it is held that a contract of a municipal corporation, void for want of authority to make it, cannot be made valid by subsequent legislative ratification or recognition, without proof that this was obtained at the request, or with the assent of the corporation, or was afterward acted upon, or confirmed by them. *Hasbrouck* v. *Milwaukee*, 13 Wis. 37. See, also, *Mills* v. *Gleason*, 11 id. 470.

§ 2. **To borrow money.** The power of municipal corporations to borrow money may be given in express language. See *Gilman* v. *Sheboygan*, 2 Black (U. S.), 510. And it has likewise been held that a municipal corporation has the *implied* power to borrow money for objects expressly authorized by its charter, as building markets, providing fire engines, etc. *Mills* v. *Gleason*, 11 Wis. 470; *Bank of Chillicothe* v. *Town of Chillicothe*, 7 Ohio, part ii, 31. And see *Commonwealth* v. *Pittsburgh*, 41 Penn. St. 278; *Ketchum* v. *City of Buffalo*, 14 N. Y. (4 Kern.) 356, 365. But see *Police Jury* v. *Britton*, 15 Wall. 566; *Beaman* v. *Board of Police*, 42 Miss. 238.

An express power to "borrow money" by a municipal corporation includes the power to issue its negotiable bonds or other usual securities to the lender. *Reinboth* v. *Pittsburgh*, 41 Penn. St. 278; *Galena* v. *Corwith*, 48 Ill. 423. See *Mayor* v. *Ray*, 19 Wall. 468. But where the issue of bills as a currency, except by banking institutions, is prohibited, a municipal corporation has no power, without express authority, to issue such bills; and if it does issue them, the holders thereof cannot recover the amount, either in an action on the bills themselves, or for money had and received. *Thomas* v. *City of Richmond*, 12 Wall. (U. S.) 349; *Dively* v. *Cedar Falls*, 21 Iowa, 565. And a general provision authorizing a city to create a debt empowers it only to create a debt for specified, legitimate, and proper municipal purposes, and not for any or all purposes, at the discretion of the city council or inhabitants. *City of Lafayette* v. *Cox*, 5 Ind. 38.

A city having power to borrow money may, however, if there be no statutory restriction, make the principal and interest payable where it pleases, though beyond the limits of the State. *Meyer* v. *City of Muscatine*, 1 Wall. 384; *Evansville, etc., R. R. Co.* v. *Evansville*, 15 Ind. 395. But in Illinois, it is held that municipal corporations cannot bind themselves to pay their indebtedness at any other place than at their treasury, unless specially authorized by statute. *Pekin* v. *Reynolds*, 31 Ill. 529; *Chicago* v. *People*, 56 id. 327.

§ 3. **Contracts for construction or local improvements.** Under

a power conferred by the legislature upon a municipal corporation, to make all contracts in their corporate capacity, which they may deem necessary for the welfare of the corporation under the Constitution, it is held that they have the right to make a contract for the construction of water-works, and may levy a tax to pay for them. *Rome* v. *Cabot*, 28 Ga. 50. So, a municipal corporation, possessed of "general powers" of such corporations at common law, may contract to build a breakwater to protect streets in the city from destruction by waters of an adjoining lake. *Miller* v. *Milwaukee*, 14 Wis. 642.

A city, in supplying gas to its inhabitants, acts as a private corporation, and is subject to the same duties, liabilities, and disabilities. And it cannot impair the obligation of a contract entered into by it, in that capacity, because it may deem it for the benefit of its citizens to do so. *Western Saving Fund Society* v. *Philadelphia*, 31 Penn. St. 175.

If the law requires that contracts shall be made by advertising for proposals for the work to be done, and by giving the contract to the lowest bidder, the city officers have no authority after the bids have been opened, to alter the contract materially and then award it to one of the original bidders without a new advertisement. *Dickinson* v. *Poughkeepsie*, 7 Hun (N. Y.), 1.

But a municipal corporation, having power to make a public improvement and incidentally the power to contract for doing the work, may voluntarily increase the contract price where the circumstances will equitably justify it, unless prohibited by its charter from doing so. *Meech* v. *Buffalo*, 29 N. Y. (2 Tiff.) 198. See *State* v. *Town of Guttenberg*, 38 N. J. Law, 419.

Municipal corporations, in the making of street improvements, authorized by law to be made at the expense of the owners of land to be benefited thereby, are, to a certain extent, the agents of such owners. *Lake* v. *Trustees of Williamsburgh*, 4 Denio, 520; *Bond* v. *Mayor of Newark*, 19 N. J. Eq. 376. Contracts lawfully made at the discretion of the authorities are binding on the land-owners, though injudiciously made; but the owners are entitled to have such contracts performed substantially in all things, according to their terms, and the authorities have no power to dispense with such performance, to the gain of the contractor and the loss of the property owners. If official authorities are about to accept and pay, under a contract, for what, in substantial and important respects, is not according to the contract, so that the difference inures to the benefit of the contractor, at the expense of the owners, the authorities, in so doing, are sacrificing the interests of those for whom they are acting and are guilty of a breach

of trust, which amounts to a fraud. The proper and only remedy in such case is in equity. Id.; *Schumm* v. *Seymour*, 24 N. J. Eq. 143.

It has been held that where a contract for street improvements is awarded in favor of a bid made in answer to duly advertised proposals therefor, a contract is thereby created; and as against the city after it has accepted the work, it matters not that the contract is not reduced to writing and signed by the contractor and the street commissioner. *Argenti* v. *San Francisco*, 16 Cal. 255.

But parol evidence is inadmissible to vary a contract created by a written resolution of a city council accepting a written proposition. *Curtiss* v. *Waterloo*, 38 Iowa, 266.

§ 4. **To contract for services.** Charter provisions, requiring that work required to be done for a municipal corporation shall be employed by contract founded on bids and proposals upon a public notice, do not apply to a contract for carriage hire of aldermen or councilmen while engaged in public duties (*Smith* v. *Mayor, etc., of New York*, 21 How. [N. Y.] 1); nor to a contract for furnishing fireworks for a 4th of July celebration (*Detwiller* v. *Mayor, etc., of New York*, 46 id. 218; S. C., 1 N. Y. Sup. [T. & C.] 657); nor generally, to services which require in their performance specific knowledge or professional skill, such as the services of a lawyer, a physician, or surveyor. *People* v. *Flagg*, 17 N. Y. (3 Smith) 584; S. C., 16 How. 36.

Where plans are furnished by an architect, and he receives the premium offered for the accepted plan by the city or its officers, the plan and not the idea becomes the property of the city. A custom among architects to retain such plans binds no one else. *Windrim* v. *Philadelphia*, 9 Phil. (Penn.) 550.

A verbal executory agreement of the common council to employ a person to build sewers cannot bind the city, where, by its charter, such contracts are required to be in writing. *Starkey* v. *Minneapolis*, 19 Minn. 203. See *Alton* v. *Mulledy*, 21 Ill. 76.

But the right of one who has furnished materials for paving the streets of a city, to recover for the same, is not prejudiced by the fact that the city council ordering the purchase kept no minutes. *Bigelow* v. *Perth Amboy*, 25 N. J. Law, 297.

It is within the legitimate province of the governing body of a municipal corporation to offer rewards for the detection of offenders against the general safety of its people. *Borough of York* v. *Forscht*, 23 Penn. St. 391. See *Janvrin* v. *Exeter*, 48 N. H. 83; S. C., 2 Am. Rep. 185. And an offer of reward, made by the mayor, in behalf of a city and subsequently ratified by the city council, is binding on the city although not so ratified until after the performance

of the service for which the reward is claimed. *Crawshaw* v. *City of Roxbury*, 7 Gray, 374. But the promise of a reward to an officer for doing that which it was his duty to do without such reward is void, for want of consideration, even if it be not illegal. *Stilk* v. *Myrick*, 2 Camp. 317; *Stotesbury* v. *Smith*, 2 Burr. 924. It is accordingly held that a watchman of a city, who, while in the discharge of his duty as such, detects a person in the commission of a crime, is not entitled to claim a reward offered by the city government. *Pool* v. *City of Boston*, 5 Cush. 219; *Gillmore* v. *Lewis*, 12 Ohio, 281; *Means* v. *Hendershott*, 24 Iowa, 78. *Ante*, Vol. 1, 99, 100.

A municipal corporation may legally indemnify an officer, acting in good faith, for a loss incurred in the discharge of his official duty, but the duty must have been one authorized or imposed by law, and the matter one in which the corporation had an interest. *Gregory* v. *Bridgeport*, 41 Conn. 76; S. C., 19 Am. Rep. 485; *State* v. *Hammonton*, 38 N. J. Law, 430; 20 Am. Rep. 404; *Sherman* v. *Carr*, 8 R. I. 431.

§ 5. **To subscribe for railroads.** A municipal corporation, unless authorized by its charter or other legislative act, can make no valid and binding subscription to the capital stock of a railroad company. *Aurora* v. *West*, 22 Ind. 88; *M. O., etc., R. R. Co.* v. *Mayor of Camden*, 23 Ark. 300.

But it is now a well-established principle that, unless restrained by the organic law, it is competent for the legislature of a State to authorize a municipal or public corporation to aid in the construction of railways by subscribing to their stock, and taxing the inhabitants or the property within their limits to pay the indebtedness thereby incurred. *Stein* v. *Mobile*, 24 Ala. 591; *Robinson* v. *Bidwell*, 22 Cal. 379; *Society for Savings* v. *New London*, 29 Conn. 174; *Cotten* v. *County Commissioners*, 6 Fla. 610; *Powers* v. *Inferior Court*, 23 Ga. 65; *Aurora* v. *West*, 9 Ind. 74; 22 id. 88; *Butler* v. *Dunham*, 27 Ill. 474; *Leavenworth County* v. *Miller*, 7 Kans. 479; 12 Am. Rep. 425; *Slack* v. *Railroad Co.*, 13 B. Monr. (Ky.) 1; *Police Jury* v. *Succession of McDonogh*, 8 La. Ann. 341; *Davidson* v. *Ramsey County*, 18 Minn. 482; *Augusta Bank* v. *Augusta*, 49 Me. 507; *City of St. Louis* v. *Alexander*, 32 Mo. 485; *People* v. *Mitchell*, 35 N. Y. (8 Tiff.) 551; *Hill* v. *Forsythe County*, 67 N. C. 367; *Railroad Co.* v. *Otoe Co.*, 2 Neb. 496; *Sharpless* v. *Mayor*, 21 Penn. St. 147; *Commonwealth* v. *Perkins*, 43 Penn. St. 400; 47 id. 489; *Copes* v. *Charleston*, 10 Rich. (S. C.) 491; *Harcourt* v. *Good*, 39 Tex. 455; *Lawson* v. *Railway Co.*, 30 Wis. 597; *Mitchell* v. *Burlington*, 4 Wall. (U. S.) 270. But see, as opposed to this power, *Hanson* v. *Vernon*, 27 Iowa,

28; 1 Am. Rep. 215; *People* v. *Township Board of Salem*, 20 Mich. 452; 4 Am. Rep. 400; *Rogan* v. *Watertown*, 30 Wis. 259. So, while municipal corporations may be compelled by legislative enactment to provide for the construction and maintenance of improvements of a public character exclusively, or to enter into a contract for an exclusively public purpose, they cannot be compelled to contract for a private purpose or to aid in the construction of works which, although beneficial to the public in some respects, are essentially private in their character. See *Thompson* v. *Pittston*, 59 Me. 545; *Jenkins* v. *Andover*, 103 Mass. 94; *Weismer* v. *Village of Douglas*, 64 N. Y. (19 Sick.) 91; S. C., 21 Am. Rep. 586; *Park Commissioners* v. *Detroit*, 28 Mich. 228; S. C., 15 Am. Rep. 202; *Allen* v. *Inhabitants of Jay*, 60 Me. 124; S. C., 11 Am. Rep. 185; *Commercial Bank* v. *City of Iola*, 2 Dill. (C. C.) 353; *People* v. *Batchellor*, 53 N. Y. (8 Sick.) 128; S. C., 13 Am. Rep. 480; *Williams* v. *Town of Duanesburgh*, 66 N. Y. (21 Sick.) 129; *Loan Association* v. *Topeka*, 20 Wall. 655. See, also, Opinions of the Judges, 58 Me. 590 *et seq.*

An authority to a municipal corporation to subscribe for stock in a railway company, "as fully as any individual," authorizes also the issue by the corporation of its negotiable bonds in payment for the stock. *Commonwealth* v. *Pittsburg*, 41 Penn. St. 278; *Seybert* v. *Pittsburg*, 1 Wall. (U. S.) 272.

Where the power to issue bonds in aid of a railway or other similar enterprise does not exist, such bonds are void even in the hands of an innocent purchaser for value. *Williamson* v. *City of Keokuk*, 44 Iowa, 88; *Clay* v. *Nicholas County Court*, 4 Bush (Ky.), 154; *Police Jury* v. *Britton*, 15 Wall. (U. S.) 566. And where the supervisors of a county possess no authority to make a subscription or issue bonds to a railroad company, in the first instance, without the previous sanction of the qualified voters of the county, they cannot ratify a subscription to the company already made without such authorization. *Marsh* v. *Fulton Co.*, 10 id. 676. And see *McPherson* v. *Foster*, 43 Iowa, 48; 22 Am. Rep. 215. But if it appears that the bonds issued show by their recitals that the power was exercised in the manner required by the legislature, and that the bonds were issued in conformity with those regulations and pursuant to those conditions and qualifications, proof that any, or all, of those recitals are incorrect will not constitute a defense to the corporation in a suit on the bonds or coupons, if it appears that it was the sole province of the municipal officers who executed the bonds to decide whether or not there had been an antecedent compliance with the regulation, condition, or qualification which it is alleged was not fulfilled. *St. Joseph Township* v. *Rogers*, 16 Wall. (U. S.) 644. And

see *Commissioners of Knox Co.* v. *Aspinwall*, 21 How. (U. S.) 539. An act of the legislature authorizing a municipal corporation to subscribe for stock in railroads, and to issue bonds to pay for the same, does not authorize it to contribute to a railroad by indorsing its bonds; and, upon the complaint of a tax payer or citizen of the corporation, a court of equity will enjoin such indorsement *Blake* v. *Mayor, etc., of Macon*, 53 Ga. 172.

§ 6. **To enact ordinances.** When the municipal charter or act of incorporation is silent as to the power to pass by-laws or ordinances, the municipal body has the power, incidental to all corporations, to enact appropriate by-laws. *Ante*, Vol. 2, 326. And it is held that a special grant of power by the legislature to a municipal corporation to adopt ordinances on enumerated subjects connected with its municipal affairs, is in addition to the incidental power of the corporation. *State* v. *Mayor, etc., of Morristown*, 33 N. J. Law, 57. See, generally, on this point, *Taylor* v. *Griswold*, 2 Green (N. J. L.), 222; *Heisembrittle* v. *Charleston*, 2 McMull. (S. C.) 233; *Commonwealth* v. *Turner*, 1 Cush. 493; *Des Moines Gas Company* v. *City of Des Moines*, 44 Iowa, 505; *State* v. *Ferguson*, 33 N. H. 424; *Collins* v. *Hatch*, 18 Ohio, 523; *Williams* v. *Augusta*, 4 Ga. 509. The power to enact and enforce ordinances has always formed an essential feature in the creation of municipal corporations, and if the organic law contains nothing restricting its exercise to any particular part of the municipal body, it may be conferred upon the mayor or common council, or the latter body alone, or any other department of the municipal government, as may appear to be most just and expedient in the judgment of the legislature. *People* v. *Special Sessions*, 7 Hun (N. Y.), 214; *Blazier* v. *Miller*, 10 Hun, 435.

No by-law of a corporation can enlarge or vary its corporate powers. *Andrews* v. *Insurance Co.*, 37 Me. 256; *Thompson* v. *Carroll*, 22 How. (U. S.) 422. And see *Mays* v. *Cincinnati*, 1 Ohio St. 268. A power vested by legislation in a city corporation, to make by-laws for its own government and the regulation of its own police, cannot be construed as imparting to it the power to repeal the general laws in force, or to supersede their operation by any of its ordinances. Such a power, if not expressly conferred, cannot arise by mere implication, unless the exercise of the power given be inconsistent with the previous law, and does necessarily operate as its repeal *pro tanto*. Nor can the presumption be indulged that the legislature intended that an ordinance passed by the city should be superior to, or take the place of, the general law of the State upon the same subject. *March* v. *Commonwealth*, 12 B. Monr. (Ky.) 25.

It is not essential to the validity of an ordinance executing powers conferred by the legislature, that it should state or indicate the power in execution of which the ordinance was passed. If it state no particular power as its basis, it will be regarded as emanating from that power which would have warranted its passage. If two such powers exist, it may be imputed to either, in conformity to which its provisions and pre-requisites show that it has been adopted. If in these respects, in accordance with both, no incongruity or injustice can result in regarding it as the offspring of both, or either of the powers. *Methodist Protestant Church* v. *Mayor, etc., of Baltimore*, 6 Gill (Md.), 391, 399. So, under a power to enact an ordinance if deemed *necessary*, the necessity for its enactment being implied from its mere passage need not be recited in the ordinance, nor averred in proceedings to enforce it. *Stuyvesant* v. *Mayor, etc., of New York*, 7 Cow. 588; *Young* v. *City of St. Louis*, 47 Mo. 492. And see *Fisher* v. *Vaughan*, 10 U. C. Q. B. 492. But if the charter requires the *necessity* to be expressed by ordinance or resolution, the declaration of the necessity is indispensable to give jurisdiction, and without it the whole proceeding is a nullity. *Hoyt* v. *City of East Saginaw*, 19 Mich. 39; S. C., 2 Am. Rep. 76.

Every by-law or ordinance of a municipal corporation must be *reasonable* (*Whyte* v. *Mayor, etc., of Nashville*, 2 Swan [Tenn.], 364; *State* v. *Freeman*, 38 N. H. 426; *State* v. *Overton*, 4 Zabr. [N. J.] 435; *Commonwealth* v. *Worcester*, 3 Pick. 462; *Clason* v. *City of Milwaukee*, 30 Wis. 316); and, ordinarily, the question whether a by-law is reasonable and valid is one of law for the court. Id. That it is *solely* a question for the court in every case, see Vol. 2, 328, and cases cited. See, also, *State* v. *Mayor, etc.*, 37 N. J. Law, 348. A by-law must likewise be general, fair, and impartial (*Chicago* v. *Rumpff*, 45 Ill. 90; *DeBen* v. *Gerard*, 4 La. Ann. 30; *City of Shreveport* v. *Levy*, 26 id. 671; 21 Am. Rep. 553); thus, a by-law which shall permit one person to carry on a dangerous business, and prohibit another, who has an equal right, from carrying on the same business, cannot be sustained (*Mayor of Hudson* v. *Thorne*, 7 Paige, 261; *Tugman* v. *Chicago*, 78 Ill. 405); nor will a by-law or ordinance be sustained, that is *oppressive* in its character (*Mayor of Memphis* v. *Winfield*, 8 Humph. 707; *St. Louis* v. *Weber*, 44 Mo. 547); nor if it contravenes a common right (*Hayden* v. *Noyes*, 5 Conn. 391); unless the power to do so be plainly conferred by legislative grant. *Taylor* v. *Griswold*, 2 Green (N. J. L.), 222.

§ 7. **Recording or publishing ordinances.** If municipal ordinances are required to be published before going into effect, the requirement is essential, and the publication must be made in the mode

designated. *State* v. *Mayor, etc., of Hoboken*, 38 N. J. Law, 110; *Higley* v. *Bunce*, 10 Conn. 567. See, also, *Matter of Anderson*, 60 N. Y. (15 Sick.) 457. Otherwise, a penalty cannot be enforced under them. *Barnett* v. *Newark*, 28 Ill. 62.

Where a city is required to promulgate its ordinances, the publication of an ordinance in a newspaper in which the ordinances are usually published, is a sufficient promulgation, though there may be other newspapers within the city. *Truchelut* v. *City Council*, 1 Nott & Mc. (S. C.) 227. And the publication of a town ordinance is held not to be invalid, because the newspaper in which it appears is published in another town, if it is the paper of general circulation in the town enacting the ordinance. *Tisdale* v. *Minonk*, 46 Ill. 9.

A notice to pave, placed on an abutter's premises, but under a stone which covered it entirely, was held not to be a compliance with an ordinance requiring such notice to be "left or placed on the premises." *Philadelphia* v. *Edwards*, 78 Penn St. 62.

Parol evidence of resolutions is held to be competent where the charter does not require them to be recorded, and no record thereof has been made. *Darlington* v. *Commonwealth*, 41 Penn. St. 68. So, where a city fails to provide any book for the record of its ordinances, but its ordinances, after their passage and approval, are placed and kept on file in the office of the city clerk, and a third party obtains a duly certified copy of an ordinance so placed and kept on file, and acts in good faith upon such ordinance, and is induced partly thereby to make a large expenditure of money, in a subsequent controversy between such city and such third parties or their assigns, the rule of equitable estoppel will apply to such city, and the due passage and existence of the ordinance may be shown by parol testimony. *City of Troy* v. *Atchison, etc., R. R. Co.*, 11 Kans. 519; 13 id. 70.

A charter provision requiring ordinances and the date of their publication to be recorded, and the record to be signed by the mayor and recorder, does not make such record a condition precedent to the validity and operation of an ordinance regularly adopted by the common council, unless that consequence is clearly expressed. *Stevenson* v. *Bay City*, 26 Mich. 44. And see *Blanchard* v. *Bissel*, 11 Ohio St. 96. But see *Kepner* v. *Commonwealth*, 40 Penn. St. 124; *Taylor* v. *Palmer*, 31 Cal. 241; *Dey* v. *Jersey City*, 19 N. J. Eq. 412.

§ 8. **Validity of ordinances.** See *ante*, 609, § 6. City ordinances conflicting with the constitution or with statutes are invalid (*Mayor, etc.*, v. *Hussey*, 21 Ga. 80); such, for instance, is an ordinance which gives to one sect a privilege which it denies to another. *City of Shreveport* v. *Levy*, 26 La. Ann. 671; 21 Am. Rep. 553. So, where an act

is a criminal offense indictable in the superior courts, an ordinance of a city or town, making such act a criminal offense punishable by fine or imprisonment, is void. *Town of Washington* v. *Hammond*, 76 N. C. 33.

Where a by-law consists of several distinct and independent parts, some of which are void, because not authorized by the charter, this does not affect the validity of the other independent provisions. *Shelton* v. *Mobile*, 30 Ala. 540. And see *Second Municipality* v. *Morgan*, 1 La. Ann. 111. But if part of a by-law, or ordinance, or resolution of a city council is void, another essential and connected part of the same is also void. *State* v. *Mayor, etc., of Hoboken*, 38 N. J. Law, 110.

In some cases a corporation may, consistently with general law, further regulate by ordinance subjects already regulated by statute. *State* v. *Welch*, 36 Conn. 215; *Huddleson* v. *Ruffin*, 6 Ohio St. 604. In a city, property of every description is much more liable to the depredations, and individuals are far more frequently subjected to petty annoyances, at the hands of the evil disposed than in the country; and the local governments may provide, by ordinance, reasonable additional protection against them. The same act may constitute an offense both against the State and the municipal government, and both may punish it without infringing any constitutional right. *City of Brownville* v. *Cook*, 4 Neb. 101. See *State* v. *Charleston*, 12 Rich. (S. C.) L. 480.

But a city ordinance authorizing a police officer to make an arrest for a breach of the ordinances of the corporation, not committed in his presence, without a warrant, is inconsistent with the general law of the land, and a police officer cannot justify such an arrest under the ordinance. *Pesterfield* v. *Vickers*, 3 Coldw. (Tenn.) 205. See *post*, 648, art. 5, § 2. And it is held that power under a charter to make by-laws and punish their infraction by fine or imprisonment does not authorize imprisonment for non-payment of a fine imposed by a by-law. *Brieswick* v. *Mayor of Brunswick*, 51 Ga. 639; S. C., 21 Am. Rep. 240. Vol. 3, 313.

§ 9. **Construction of ordinances.** Effect must be given, if possible, to all ordinances regularly passed, and within the powers conferred by the charter. See *Merriam* v. *New Orleans*, 14 La. Ann. 318; *Commonwealth* v. *Robertson*, 5 Cush. 438. Thus, although a city ordinance in relation to the widening, laying out, etc., of streets, be confused, yet, if by careful reading, aided by a map, it is intelligible, it will not be void for uncertainty. *State* v. *City of Plainfield*, 38 N. J. Law, 95.

But an ordinance in its nature highly penal is to be strictly con-

strued. *Krickle* v. *Commonwealth*, 1 B. Monr. 361. Thus, where an ordinance required that the party should be served with notice, it was held that *personal* notice was necessary. *St. Louis* v. *Goebel*, 32 Mo. 295. See *City Council* v. *Blake*, 12 Rich. (S. C.) 66.

Ordinances directing the mere repairing or repaving of streets, etc., enjoined upon municipal corporations as duties, are *ministerial* ordinances; those directing new streets to be opened, etc., by which the property of individuals is taken or affected, are *judicial*. So, where the corporation is authorized to require paving, not as ordinary repairs, but upon specified conditions and to impose the burden on a specific class, the ordinance is judicial. *Camden* v. *Mulford*, 26 N. J. Law, 49.

§ 10. **Effect of ordinances.** An ordinance of a municipal corporation, like a State law, can have no extraterritorial force, unless the power be plainly conferred upon the corporation (*Strauss* v. *Pontiac*, 40 Ill. 301; *Plymouth* v. *Pettijohn*, 4 Dev. [N. C.] 591; *New Orleans* v. *Anderson*, 9 La. Ann. 323); but, as in the case of any other law, when persons or property come within its territory, they are under its authority. *Gosselink* v. *Campbell*, 4 Iowa, 296; *Heland* v. *Lowell*, 3 Allen, 407; *Horney* v. *Sloan*, 1 Ind. 266; *Whitfield* v. *Longest*, 6 Ired. (N. C.) 268; *Reed* v. *People*, 1 Park. (N. Y.) 481. In a prosecution under an ordinance of a city, the ordinance should be pleaded and proved. Courts do not take judicial notice of them. *Winona* v. *Burke*, 23 Minn. 254; *Goodrich* v. *Brown*, 30 Iowa, 291.

A charter power conferred upon a city, in ordinary terms, "to enact ordinances necessary for government," does not extend to a power to grant to individuals a franchise of building a toll-gate across a river flowing through the city. *Williams* v. *Davidson*, 43 Tex. 1.

§ 11. **Enforcement of ordinances.** The law implies a promise by every member of a corporation to pay all the penalties incurred for his violation of the by-laws thereof; and if the mode of enforcing payment is not pointed out, the corporation may sue for the penalties in any competent court. *Hesketh* v. *Braddock*, 3 Burr. 1858; *Israel* v. *Jacksonville*, 1 Scam. (Ill.) 290; *Coates* v. *Mayor*, 7 Cow. 585; *City* v. *Duveau*, 4 Phil. (Penn.) 145; *Ewbanks* v. *Ashley*, 36 Ill. 178; *Columbia* v. *Harrison*, 2 Const. (S. C.) Rep. 215. And a municipal corporation *de facto* as well as a corporation *de jure* can maintain an action for a penalty. *Hamilton* v. *Carthage*, 24 Ill. 22. If, however, the mode of enforcing a by-law or ordinance is prescribed by the charter or incorporating act, that mode must be pursued. *Weeks* v. *Forman*, 1 Harr. (N. J.) 237; *Brown* v. *Mayor of Mobile*, 23 Ala. 722; *Hart* v. *Mayor of Albany*, 9 Wend. 571; *Williamson* v. *Commonwealth*, 4 B. Monr. (Ky.) 146. And see *City of Brownville* v. *Cook*, 4 Neb. 101; *McNulty*

v. *Connew*, 50 Ind. 569; *Goldthwaite* v. *City Council of Montgomery*, 50 Ala. 486. See, as to the power of a municipal corporation to suspend the operation of an ordinance. *Hill* v. *Board of Aldermen*, 72 N. C. 55; S. C., 21 Am. Rep. 451.

§ 12. **Regulation of streets, etc.** The legislature of the State, as the representative of the public at large, has full and paramount authority over all public ways and public places. *O'Connor* v. *Pittsburgh*, 18 Penn. St. 187; *Baird* v. *Rice*, 63 id. 489; *Litchfield* v. *Vernon*, 41 N. Y. (2 Hand) 123; *James River Co.* v. *Anderson*, 12 Leigh (Va.), 286. But, instead of exercising this authority directly, the legislature may authorize it to be exercised by local or municipal authorities. *Sinton* v. *Ashbury*, 41 Cal. 525. And in this country, it is usual for the legislature to confer upon municipal corporations very extensive powers as it respects streets and public ways within their limits, and the uses to which they may be appropriated. And a city, by virtue of its corporate authority, may regulate the use of the streets, etc., and is the representative of the public, to vindicate the public right, though without ownership of the soil, or easement. *Dubuque* v. *Maloney*, 9 Iowa, 450. And see *Inhabitants* v. *New Orleans*, 14 La. Ann. 452.

The power to open streets in a city implies the power to establish the grade of such streets (*Himmelman* v. *Hoadley*, 44 Cal. 213); and a power to regulate the grade of streets includes the power to re-grade. *Creal* v. *Keokuk*, 4 Greene (Iowa), 47. So, municipal power to regulate streets and sidewalks includes the power to determine the width of each. *State* v. *Morristown*, 33 N. J. Law, 57. A municipal corporation having power to grade streets, etc., likewise has power to make contracts respecting the same, in regard to the work to be done, and the compensation to be paid. *Sturtevants* v. *Alton*, 3 McLean (C. C.), 393. See, also, *People* v. *Flagg*, 17 N. Y. (3 Smith) 584. And the right to fit up a building for city or public purposes, and to provide suitable accommodations for the transaction of the city business, is a necessary incident to the administration of every municipal government. *People* v. *Harris*, 4 Cal. 9. So, although the fee of the streets of a city may be in the adjoining proprietor, subject to the public easement, yet the city, by virtue of its general authority over streets, may cause *sewers* to be made therein (*Fisher* v. *Harrisburg*, 2 Grant's [Penn.] Cas. 291; *Kelsey* v. *King*, 32 Barb. 410; S. C. affirmed, 33 How. 39; *Cone* v. *Hartford*, 28 Conn. 363); and the owner is not entitled to have his damages assessed as for a new use or servitude. Id. See, also, *West* v. *Bancroft*, 32 Vt. 367. And when the act of incorporation confers power on the corporation to control its streets, and its duty is to improve them so as to afford a safe and easy transit, it may

construct a *bridge* across a stream dividing the streets, and issue its bonds to pay for the same. *Mullarky* v. *Cedar Falls*, 19 Iowa, 21; *Chicago* v. *Powers*, 42 Ill. 169; *Corey* v. *Rice*, 4 Lans. (N. Y.) 141.

The power to grade and improve streets is a continuing one, unless the contrary be indicated, and the power may be exercised from time to time, as the wants of the municipality may require. *Gall* v. *Cincinnati*, 18 Ohio St. 563; *Karst* v. *St. Paul, etc., R. R. Co.*, 22 Minn. 118; *New Haven* v. *Sargent*, 38 Conn. 50; S. C., 9 Am. Rep. 360; *Smith* v. *Washington*, 20 How. (U. S.) 135. And of the necessity or expediency of its exercise, the governing body of the corporation, and not the courts, are the judges. *McCormack* v. *Patchin*, 53 Mo. 33; S. C., 14 Am. Rep. 440; *Markham* v. *Mayor*, 23 Ga. 402; *Plum* v. *Canal Company*, 2 Stockt. (N. J.) 256. It is likewise settled law that, unless expressly so declared by charter or statute, a municipal corporation is not liable to property owners for the consequential damages necessarily resulting from either establishing a grade or changing an established grade of streets, although improvements were made in conformity with the first grade. Id.; *Hovey* v. *Mayo*, 43 Me. 322; *City of Delphi* v. *Evans*, 36 Ind. 90; S. C., 10 Am. Rep. 12; *Creal* v. *Keokuk*, 4 G. Greene (Iowa), 47; *Green* v. *Reading*, 9 Watts, 382. See *Louisville* v. *Rolling Mill Co.*, 3 Bush (Ky.), 416.

Express legislative sanction is requisite to warrant the laying down of gas pipes in the public highways in Great Britain. *Queen* v. *Gas Co.*, 2 El. & El. 651; *Galbreath* v. *Armour*, 4 Bell's App. Cas. 374; *Reg.* v. *Sheffield Gas Co.*, 22 Eng. Law & Eq. 200. And see *Boston* v. *Richardson*, 13 Allen, 160. So, in this country, it is considered that the right to use the streets of a city for the purpose of laying pipes to convey gas, is a franchise, and as such can only emanate directly or indirectly from the legislature. *State* v. *Cincinnati Gas., etc., Co.*, 18 Ohio St. 262. And see *Milhau* v. *Sharp*, 15 Barb. 210; *Norwich Gas Co.* v. *Norwich City Gas Co.*, 25 Conn. 19. That the legislature may confer upon a private corporation the *exclusive right* to manufacture and sell gas, and to erect works and lay pipes therefor, within the limits of a municipal corporation, see *State* v. *Milwaukee Gas Light Co.*, 29 Wis. 454; S. C., 9 Am. Rep. 598.

The use of streets for the purpose of laying down water-pipes rests upon the same principles as their use for sewers and gas-pipes. The erection of water-works, to supply a city and its inhabitants with water, falls naturally and legitimately within the ordinary powers of its charter of incorporation, and the exercise of this power within the limits of its charter needs no enabling act by the legislature. See *Kelsey* v. *King*, 32 Barb. 410; *West* v. *Bancroft*, 32 Vt. 367; *City of Memphis* v. *Mem-*

phis Water Co., 5 Heisk. (Tenn.) 495. If not expressly, or by necessary implication, forbidden by the Constitution, the legislature may grant to a private company, for a term of years, the exclusive use of the streets and alleys for the erection of water-works therein, and thus revoke the power of the city to use them; and this without entitling either the city or the abutters to compensation. Id.

In general, the streets of cities or villages may be appropriated for any public use which is consistent and in harmony with their use as public highways. And new discoveries make new uses; thus, telegraph poles run on highways all over the land. But legislative sanction directly given, or conferred through municipal action, is required to authorize the use of streets for the last-mentioned purpose. And if such poles be erected within the limits of a street or highway without such sanction, they will be treated as nuisances. *Reg.* v. *Telegraph Co.*, 9 Cox's Cr. Cas. 174; *Commonwealth* v. *Boston*, 97 Mass. 555.

When it is considered that highways are public for other purposes than traveling, for shade trees and sidewalks, by legislative enactment, and for sewers, lamps, gas and water-pipes, public wells and cisterns, and that these uses are in harmony with the uses of a public highway when they do not obstruct travel, the further conclusion is readily reached that the law will sanction the erection of a work of art, such as an ornamental statue, without thereby trespassing in any respect on the rights of the owner of the soil, who holds strictly subordinate to public use. Hence it is, that statues of men, and in commemoration of great public events, are now considered as the legitimate belongings of public places. *Tompkins* v. *Hodgson*, 2 Hun (N. Y.), 146; S. C., 4 N. Y. Sup. Ct. (T. & C.) 435. But whatever interferes unreasonably and unnecessarily with the public right of free and unobstructed transit over streets, sidewalks, and alleys, is a nuisance, which a city council may well prohibit by ordinance. Thus, a city having "the care, supervision, and control of streets, squares, and commons" within its limits, may, by ordinance, prohibit the appropriation of these to private use, such as sales by individuals at auction thereon, or upon the sidewalks or streets. *White* v. *Kent*, 11 Ohio St. 550; *Shelton* v. *Mobile*, 30 Ala. 540. And see *Hawley* v. *Harrall*, 19 Conn. 142; *Pedrick* v. *Bailey*, 12 Gray, 161; *Philadelphia* v. *Railroad Co.*, 58 Penn. St. 253; *Smith* v. *Leavenworth*, 15 Kans. 81; *Lutterloh* v. *Mayor of Cedar Keys*, 15 Fla. 306; Dill. on Mun. Corp., § 538.

A municipal corporation, authorized "to locate and establish streets and *vacate* the same," may vacate any street, and the right to vacate is not confined to the streets which the city may "locate and establish," and this power, when discreetly exercised, will not be restrained when

no material injury results therefrom. *Gray* v. *Iowa Land Co.*, 26 Iowa, 387. And see *Baird* v. *Rice*, 63 Penn. St. 489; *Bailey* v. *Railroad Co.*, 4 Harr. (Del.) 389; *Riggs* v. *Board of Education of Detroit*, 27 Mich. 262. Upon the discontinuance of an easement in a public highway, the freehold, or soil, generally reverts to the owner of the land. *Harris* v. *Elliott*, 10 Pet. (U. S.) 26. See *Kimball* v. *Kenosha*, 4 Wis. 321.

The power of a city over its streets and the right of the public to them extends upward indefinitely for the purpose of their preservation, safe use, and enjoyment; and the duty of a city in this respect is commensurate with its power. *Grove* v. *City of Fort Wayne*, 45 Ind. 429; 15 Am. Rep. 262.

The corporate authorities of a city hold the public streets in trust for the use of the public. Where the municipality possesses the fee in such streets, although in trust for public uses, it may maintain *ejectment* against any one who wrongfully intrudes upon, or occupies, or detains the property. Where the adjoining proprietor retains the fee, the right to the possession, use and control of the street by the municipality is regarded as a legal, and not a mere equitable, right. *Chicago* v. *Wright*, 69 Ill. 318; *Winona* v. *Huff*, 11 Minn. 119; *Dummer* v. *Jersey City*, 1 Spencer (N. J.), 86.

In Great Britain legislative sanction is requisite to enable the town or others to occupy the streets or highways for the purpose of a horse or street railway (*Queen* v. *Charlesworth*, 16 Q. B. 1012; *Reg.* v. *Train*, 9 Cox's Cr. Cas. 180); and such is doubtless the law in this country. *City Railroad Co.* v. *Memphis*, 4 Coldw. (Tenn.) 406; *Boston* v. *Richardson*, 13 Allen, 146; Dill. on Mun. Corp., § 568. But the ordinary powers of municipal corporations are usually ample enough, in the absence of express legislation on the subject, to authorize them to permit or refuse to permit the use of streets within their limits for street railway purposes. Id., § 575; *Railroad Co.* v. *Baltimore*, 21 Md. 93; *City Railway Co.* v. *Louisville*, 4 Bush (Ky.), 478; *Sixth Avenue R. R. Co.* v. *Kerr*, 45 Barb. 138; S. C. affirmed, 28 How. 382; *Frankfort Passenger Railway Co.* v. *Philadelphia*, 58 Penn. St. 119; *Hinchman* v. *Paterson Horse Railroad Co.*, 17 N. J. Eq. 75; *Brown* v. *Duplessis*, 14 La. Ann. 842. See *Coleman* v. *Second Avenue Railway Co.*, 38 N. Y. (11 Tiff.) 201. In New York the use of a street for a horse railway is considered to be a new servitude, for which the adjacent owner is entitled to compensation. *Craig* v. *Rochester, etc., R. R. Co.*, 39 N. Y. (12 Tiff.) 404. And see *Bloomfield, etc., Gas Light Co.* v. *Calkins*, 62 N. Y. (17 Sick.) 386. But it is the prevailing opinion of the courts that a steam railway is, while a

horse railway is not, an additional servitude. See *Jersey City, etc., R. R. Co.* v. *Jersey City, etc., R. R. Co.*, 20 N. J. Eq. 61; *Hobart* v. *Railroad Co.*, 27 Wis. 194; *Pomeroy* v. *Railroad Co.*, 16 id. 640; *Commonwealth* v. *Temple*, 14 Gray, 75; *Street Railway* v. *Cumminsville*, 14 Ohio St. 523. See *post*, tit. *Railroads*.

A by-law of a city forbidding the driving of horses with wagons, carts, trucks and sleds attached, faster than a moderate footpace, is held to be reasonable, and within the ordinary powers of a city government, without the express permission of the legislature. *Commonwealth* v. *Worcester*, Thach. (Mass.) Cr. Cas. 100. So, under a power to make such ordinances "respecting streets, wagons, carts, drays, etc., as to the council shall appear necessary for the security, welfare and convenience of the city," an ordinance regulating the weight which should be carried on loaded wagons over the streets of the city was held to be legal and valid, and authorized by the charter. *Nagle* v. *City Council of Augusta*, 5 Ga. 546. But an ordinance which would operate as a total exclusion of the right of the citizen to pass over the streets of the city, with his loaded wagon and team, would be unreasonable and void as against common right. Id. See *Gartside* v. *East St. Louis*, 43 Ill. 47.

A city ordinance, providing that no person shall maintain an awning before his door without the consent of the mayor and aldermen, is reasonable, and an awning erected without such consent is an unlawful obstruction. *Pedrick* v. *Bailey*, 12 Gray, 161; *Fox* v. *Winona*, 23 Minn. 10.

So, a city ordinance, requiring the owners of lots fronting on a certain street to fix curbstones and construct a way in front of their lot, is held to be valid. *Paxson* v. *Sweet*, 13 N. J. Law, 196. See, also, *Washington* v. *Nashville*, 1 Swan (Tenn.), 177; *Mayor* v. *Maberry*, 6 Humph. 368.

§ 13. **Abating nuisances.** In order to secure and promote the public health, safety and convenience, municipal corporations are liberally endowed with power to prevent (*Gregory* v. *City of New York*, 40 N. Y. [1 Hand] 273); and abate nuisances. *Baker* v. *Boston*, 12 Pick. 184; *Kennedy* v. *Phelps*, 10 La. Ann. 227. See, also, *Van Dyke* v. *Cincinnati*, 5 Disney (Ohio), 532; *Dingley* v. *Boston*, 100 Mass. 544; *Lake View* v. *Letz*, 44 Ill. 81. But the legislation of a municipal corporation must be subordinate to the power to which it owes its existence; and the common council may not declare any thing a nuisance which cannot be detrimental to the health of the city, or dangerous to its citizens, or a public inconvenience, and even then not where the thing complained of is expressly authorized

by the supreme legislative power of the State. *State* v. *Jersey City*, 5 Dutch. (N. J.) 170. It is said to be a doctrine not to be tolerated in this country, that a municipal corporation, without any general laws either of the city or of the State, within which a given structure can be shown to be a nuisance, can, by the mere declaration that it is one, subject it to removal by any person supposed to be aggrieved, or even by the city itself. This would place every house, every business, and all the property in the city at the uncontrolled will of the temporary local authorities. MILLER, J., in *Yates* v. *Milwaukee*, 10 Wall. 497. See, also, *Miller* v. *Burch*, 32 Tex. 208; S. C., 5 Am. Rep. 242; *Pye* v. *Peterson*, 45 Tex. 312; *Underwood* v. *Green*, 42 N. Y. (3 Hand) 140; *Darst* v. *People*, 51 Ill. 286; S. C., 2 Am. Rep. 301; *Chicago, etc., R. R. Co.* v. *City of Joliet*, 79 Ill. 25. See *post*, tit. *Nuisances*.

It has been held that the power possessed by a municipal corporation to enact "by-laws relating to nuisances generally," authorized an ordinance prohibiting the keeping, in any manner whatsoever, of a bowling alley for gain or hire, such a place being a public nuisance at common law. *Tanner* v. *Trustees of Albion*, 5 Hill, 121. And see *Updike* v. *Campbell*, 4 E. D. Smith (N. Y.), 570; *Smith* v. *Madison*, 7 Ind. 86; *Jackson* v. *People*, 9 Mich. 111. But see *State* v. *Hull*, 32 N. J. Law, 158. And where a city has the power, by its charter, to determine whether bowling alleys should be allowed, and, if so, under what restrictions, an ordinance requiring them to be closed at a certain hour is valid. *State* v. *Hay*, 29 Me. 457.

It has been held that where a city licenses an exhibition of wild animals, knowing that it is calculated to frighten horses and endanger the lives and property of persons traveling in the streets, and the officers and agents of the city knowingly and carelessly allow one of its streets to be obstructed by such xhibition, and a person traveling with a team along such street is injured in consequence of the team becoming thereby frightened and unmanageable, the city is liable in damages. *Little* v. *City of Madison*, 42 Wis. 643.

The exhibition of a stud-horse in the streets of a town is held to be a nuisance, and a municipal corporation, authorized by its charter to prevent and remove nuisances, may inflict a penalty for the exhibition. *Nolan* v. *Mayor of Franklin*, 4 Yerg. 163. So, a "bawdy house" or "house of ill-fame," is a public nuisance at common law, and a power to make by-laws relative to nuisances confers authority to impose penalties on the keepers of such houses, and on persons owning houses used, with their knowledge, for this purpose. *McAlister* v. *Clark*, 33 Conn. 91. See, also, *Childress* v. *Mayor of Nashville*, 3 Sneed, 347; *Shafer* v. *Mumma*, 17 Md. 331. But power given to the common

council of a city "to make all such by-laws and ordinances as may be deemed expedient for the purpose of preventing and suppressing houses of ill-fame," does not authorize the council, by ordinance and resolution, to require a city officer to demolish a house occupied as a house of ill-fame, and adjudged by such council to be a common nuisance. *Welch* v. *Stowell*, 2 Doug. (Mich.) 332. Nor have individuals the right to abate the nuisance occasioned by the occupation of a building as a house of ill-fame, by demolishing the building. Id. See, also, *Ely* v. *Supervisors*, 36 N. Y. (9 Tiff.) 297. And see *post*, title *Nuisances.*

But under a power "to prevent and remove nuisances," it is held that a corporation may, if a vacant building is so used as to endanger by fire the property of others, or the health of the community, declare the same a nuisance and notify the owner to abate it, and if he fails, the individual officer of the corporation who abates the nuisance may, on being individually sued, justify the act. *Harvey* v. *Dewoody*, 18 Ark. 252. And see *Montgomery* v. *Hutchinson*, 13 Ala. 573; *Ferguson* v. *City of Selma*, 43 id. 398. So, a city whose duty it is to prevent obstructions in a river within its limits may, by its own act, and without indictment, abate or remove any thing which obstructs the free and common use of the river, such obstruction being a public nuisance. *Hart* v. *Mayor of Albany*, 9 Wend. 571. See *Hoeft* v. *Seaman*, 46 How. (N. Y.) 24, 32; S. C., 6 J. & Sp. 62; *People* v. *Vanderbilt*, 28 N. Y. (1 Tiff.) 396.

Under a power to make such ordinances as the council "may consider fit and proper to remove nuisances or causes of disease," etc., it was held that the city of Savannah might prohibit the growing of rice within the corporate limits, as being injurious to the health of the city, and abate the same, and that such an ordinance was valid as a police regulation. *Green* v. *Mayor, etc., of Savannah*, 6 Ga. 1.

If a city, as between itself and the author of a nuisance in a street, is also a wrong-doer, it can have no remedy over against the author of the nuisance for damages it may be compelled to pay to a third person, in consequence of the wrongful act. *Knox* v. *City of Sterling*, 73 Ill. 214. See *post*, tit. *Nuisances.*

§ 14. **Making local improvements.** See *ante*, 604, art. 3, § 3. One of the most important powers conferred upon municipal corporations is the authority to exercise, by delegation from the legislature, the right of "eminent domain;" that is, the right to appropriate, on making compensation in the prescribed mode, private property for municipal or public use. But a municipal corporation has no *implied*

power, in the nature of eminent domain, to condemn lands of individuals for local improvements. The right is, originally, wholly in the State, and can only be exercised by a city or other municipal corporation in virtue of some express legislative grant. *Dyckman* v. *Mayor*, 5 N. Y. (1 Seld.) 434; *Water Works Co.* v. *Burkhart*, 41 Ind. 364. And when the power is delegated by the legislature to a municipal corporation, its exercise is subject to the inflexible rule that the power must be *strictly pursued*. Id.; *State* v. *Jersey City*, 1 Dutch. (N. J.) 310; *Harbeck* v. *Toledo*, 11 Ohio St. 219; *Leslie* v. *St. Louis*, 47 Mo. 474; *Trumpler* v. *Bemerly*, 39 Cal. 490; *New Orleans* v. *Sohr*, 16 La. Ann. 393; *Nichols* v. *Bridgeport*, 23 Conn. 189; *Dennis* v. *Hughes*, 8 Up. Can. Q. B. 444; *Stockton* v. *Whitmore*, 50 Cal. 554. Thus, proceedings whereby private property is taken against the will of the owner, for the purpose of opening a street, being special and adverse, must comply strictly with every provision of the law, which is not so purely formal as in no way to bear upon the protection or rights of the parties to be affected. *Matter of Powers*, 29 Mich. 504.

So, the right of taking the property of an individual without his consent is confined to those cases where the property is required for *public* use. Private property cannot be taken for *private* use, even on making compensation. *Embury* v. *Conner*, 3 N. Y. (3 Comst.) 511. And the question whether the use for which private property is sought to be taken, under and by the exercise of the right of eminent domain, is public or private, is held to be a judicial one, to be determined by the courts; and the grant by the legislature of the right to take is not conclusive evidence that the use is a *public* one. Id.; *Matter of Deanville Cemetery Association*, 66 N. Y. (21 Sick.) 569. See, also, *Hanson* v. *Vernon*, 27 Iowa, 28; 1 Am. Rep. 215; *Talbot* v. *Hudson*, 16 Gray, 417; *Freight Company* v. *Memphis*, 4 Coldw. (Tenn.) 419. But as it regards the *necessity* or *expediency* of taking private property for public use, the opinion of the legislature, or of the corporate body or tribunal upon which it has conferred the power to determine the question, is conclusive upon the courts, since such a question is essentially political in its nature, and not judicial. *Brooklyn Park Commissioners* v. *Armstrong*, 45 N. Y. (6 Hand) 234; S. C., 6 Am. Rep. 70; *Giesy* v. *Cincinnati, etc., Railroad Company*, 4 Ohio St. 308; Dill. on Mun. Corp., § 465. See, also, *Dunham* v. *Hyde Park*, 75 Ill. 371; *Brush* v. *City of Carbondale*, 78 id. 74.

On the ground that the public health, convenience and welfare will be thereby promoted, the legislature may authorize the condemnation of private property for use as a public park (*Park Commis-*

sioners v. *Williams*, 51 Ill. 57; *Matter of Central Park Extension*, 16 Abb. Pr. [N. Y.] 56. See *State* v. *Leffingwell*, 54 Mo. 458); or a public square (*Owners of Ground, etc.* v. *Mayor, etc., of Albany*, 15 Wend. 374), or for the construction of drains and sewers. *Hildreth* v. *Lowell*, 11 Gray, 345. So, the authority is frequently conferred upon towns and cities to take private property for the purpose of supplying the inhabitants with pure water, this being clearly a public use. *Burden* v. *Stein*, 27 Ala. 104; *Wayland* v. *County Commissioners*, 4 Gray, 500; *Stafford* v. *Providence*, 10 R. I. 567; S. C., 14 Am. Rep. 710; *Mayor, etc., of New York* v. *Bailey*, 2 Denio, 433, 446. And the condemnation of private property for streets, alleys and public ways is unquestionably for a public use. *Dorgan* v. *Boston*, 12 Allen, 223; *Patrick* v. *Commissioners*, 4 McCord (S. C.), 541; *West River Bridge Co.* v. *Dix*, 6 How. (U. S.) 507, 545.

It is, however, held that a municipal corporation created by a State, and deriving all its privileges therefrom, has not the power or authority to take the property of the State, purchased by the latter for a specific object, for the purpose of appropriating the same for a public street. *Mayor, etc., of Atlanta* v. *Central R. R. Co.*, 53 Ga. 120. So, under a general power to lay out and open streets, a city cannot lay out and open a street through the depot grounds of a railway, so as to destroy the value of the company's easement, acquired by condemnation under express legislative authority. *Milwaukee, etc., Railway Co.* v. *City of Faribault*, 23 Minn. 167.

Nor is it within the corporate powers of a city to open streets on lands within the corporate limits, belonging to the United States, and which have never been sold to private persons. *United States* v. *Chicago*, 7 How. (U. S.) 185. So, it is the better opinion that property cannot be acquired against the owner's consent when wanted for purposes merely *ornamental* (see *West River Bridge Co.* v. *Dix*, 6 How. [U. S.] 545; *Blodgett* v. *Boston*, 8 Allen, 237), but it is said that ornament, and the improvement of grounds about a public building, may be taken into consideration and regarded in connection with the convenience and necessity of a proposed highway, although they do not alone constitute a sufficient basis for establishing it. *Woodstock* v. *Gallup*, 28 Vt. 587; 29 id. 347. And see *Higginson* v. *Inhabitants of Nahant*, 11 Allen, 530.

All modes of opening, widening, and closing streets, by right of eminent domain, are, of course, subject to the constitutional inhibition, that the legislature shall enact no law authorizing private property to be taken for public use without just compensation. *State* v. *Graves*, 19 Md. 351; *Mayor, etc., of Jersey City* v. *Fitzpatrick*, 36 N. J.

Law, 120. And when a street is finally established, the party whose land has been taken is entitled to payment, although the street has not been opened. *Steuart* v. *Baltimore*, 7 Md. 500; *Philadelphia* v. *Dickson*, 38 Penn. St. 247; *Griggs* v. *Foote*, 4 Allen, 195. The South Carolina cases (see *Patrick* v. *Commissioners*, 4 McCord, 540; *State* v. *Dawson*, 3 Hill [S. C.], 100), which hold that private property may be taken for streets, roads, etc., against the owner's consent and without compensation, are not elsewhere regarded as law. And see *Dunn* v. *Charleston*, Harper (S. C. L.), 189.

Notice of the proceedings to take property for public use, when required to be given, is the foundation of the right to proceed, and if such notice be not given, or if not given in the way prescribed, the proceedings are void. *Baltimore* v. *Bouldin*, 23 Md. 328; *Darlington* v. *Commonwealth*, 41 Penn. St. 68; *Harbeck* v. *Toledo*, 11 Ohio St. 219; *Nichols* v. *Bridgeport*, 23 Conn. 189. But the legislature may, in the absence of a special constitutional restriction, provide for *constructive* notice only to those interested. *Swan* v. *Williams*, 2 Mich. 427; *Palmyra* v. *Morton*, 25 Mo. 593; Dill. on Mun. Corp., § 471. And where a charter provides for constructive notice of improvements by publication *personal* notice is not required. *State* v. *City of Plainfield*, 38 N. J. Law, 95.

In the exercise of the power of "eminent domain," it is not necessary for the city council to preface their laying out of a highway or street, by declaring that they find such highway or street to be expedient or necessary. This *necessity* is sufficiently implied in their action on the subject, inasmuch as they can act only in such a case. They need not record their motives where they have jurisdiction to act. But it might be otherwise, did their jurisdiction depend upon their first finding a preliminary fact to be true. *Townsend* v. *Hoyle*, 20 Conn. 1, 9.

§ 15. **Granting licenses, etc.** Power conferred by its charter upon a municipal corporation "to license and regulate," or to "license, regulate, and tax;" certain employments and callings, and to "tax and restrain" or "prohibit" exhibitions, shows, places of amusement, and the like, may be constitutionally exercised, unless there is some specific limitation on the authority of the legislature in this respect. *City of Burlington* v. *Lawrence*, 42 Iowa, 681; *Savannah* v. *Charlton*, 36 Ga. 460; *Mayor, etc., of Mobile* v. *Yuille*, 3 Ala. 137; *Fretwell* v. *City of Troy*, 18 Kans. 271; *Slaughter* v. *Commonwealth*, 13 Gratt. 767; *Paige* v. *Fazackerly*, 36 Barb. 392; *City of Boston* v. *Schaffer*, 9 Pick. 415. And the power to license and regulate is held to carry with it the right to require the payment of a reasonable sum in consideration of the license. *State* v. *Herod*, 29 Iowa, 123. So, under a

grant of power to "license, regulate, and restrain amusements," a municipal corporation may exercise the *taxing* power as a means of effecting this object. *Hodges* v. *The Mayor*, 2 Humph. (Tenn.) 61.

The power of the legislature to delegate to municipal corporations the right to establish markets, and regulate the sale and purchase of marketable articles and to forbid the sale or purchase of such at other than the market places during market-hours, is unquestionable. *City of Bowling Green* v. *Carson*, 10 Bush (Ky.), 64. And see *St. Louis* v. *Weber*, 44 Mo. 547; *Atlanta* v. *White*, 33 Ga. 229; *St. Paul* v. *Colter*, 12 Minn. 41; *Wartman* v. *Philadelphia*, 33 Penn. St. 202. The right to make such regulations grows out of the general police power of the government, and unless they are unreasonable or oppressive, it is the duty of the courts to enforce them. *Municipality No. One* v. *Cutting*, 4 La. Ann. 336. So, the power to establish and regulate markets and market places is a *continuing* one, and its exercise at one period by establishing a market place and erecting a market house in a particular locality will not prevent the council intrusted by the charter with the exercise of the power from removing such building, or abandoning such locality for market purposes. *Gall* v. *City of Cincinnati*, 18 Ohio St. 563. Power "to establish" a market authorizes, as a necessary incident, the purchase of real estate for the purposes of a market. *People* v. *Lowber*, 7 Abb. Pr. 158; S. C., 28 Barb. 65; *Ketchum* v. *Buffalo*, 14 N. Y. (4 Kern.) 356; *Gale* v. *Kalamazoo*, 23 Mich. 344; S. C., 9 Am. Rep. 80. So, the general power to build markets includes the authority to employ an architect to prepare plans, specifications, etc., for their construction. *Peterson* v. *Mayor, etc., of New York*, 17 N. Y. (3 Smith) 449. But the right "to establish" a market gives no right to build one on a public street. *Wartman* v. *Philadelphia*, 33 Penn. St. 202. See *State* v. *Laverack*, 34 N. J. Law, 201.

The grant by a city of a license and lease of a market stall does not amount to a contract on the part of the corporation to prevent unlicensed sales by other persons, the breach of which will excuse payment of rent, although it is the duty of the officers of the corporation, under its ordinances, to prevent such sales. *Peck* v. *Austin*, 22 Tex. 261.

The right of a municipal corporation to license occupations, etc., must be plainly conferred, or it will not be held to exist. Thus, a power to make "by-laws relative to hucksters, grocers, and victualing shops," gives no authority to the corporation to exact a *license* from persons carrying on such business. *Mays* v. *Cincinnati*, 1 Ohio St. 268; *Dunham* v. *Trustees of Rochester*, 5 Cow. 462. And see *Leon-*

ard v. *Canton*, 35 Miss. 189. So, the power to license and regulate a lawful and necessary business confers no authority upon the corporation to make a contract creating or tending to create a monopoly. *Gale* v. *Kalamazoo*, 23 Mich. 344; S. C., 9 Am. Rep. 80. And see *Tuckahoe Canal Co.* v. *Tuckahoe R. R. Co.*, 11 Leigh (Va.), 42. It is no part of the design of the legislature, in organizing municipal corporations, that the corporate authorities shall enter into competition with the inhabitants in business or trade, or to sell, or even grant, special immunities to any portion of the inhabitants for their individual benefit or gain. The corporate authorities must exercise their franchises solely for the benefit of the community embraced within the corporate limits. *City of Chicago* v. *Rumpff*, 45 Ill. 90. That the corporate power to tax vocations may properly be extended equally to all persons plying the vocation within the corporate limits, whether they reside within them or not, see *Commissioners of Edenton* v. *Capeheart*, 71 N. C. 156.

When, by the charter of a city, the power to license a particular occupation within its limits is given to the common council of the city, such power involves the necessity of determining with reasonable certainty both the extent or duration of the license, and the sum to be paid therefor; and such power must be exercised exclusively by the common council, and cannot be delegated by it, in whole or in part, to any other person or authority. *Darling* v. *City of St. Paul*, 19 Minn. 389. See, also, *Day* v. *Green*, 4 Cush. 433.

A city ordinance prohibiting the sale of intoxicating liquors, without a license, is not in derogation of the common rights of the citizens, but a restraint of the trade of a few for the benefit of the many, and is constitutional. *City Council* v. *Ahrens*, 4 Strobh. (S. C.) 241. Thus, in the absence of *general* laws of the State controlling the sale of intoxicating liquors, power to a city to pass "in general, every other by-law or regulation that shall appear to the city council requisite and necessary for the security, welfare, and convenience of the city, or for preserving the peace, order, and good government within the same," was held to authorize an ordinance to prevent shopkeepers, unless licensed by the city, from keeping spirituous liquors, wines, etc., in their shops, or in any adjacent room. *Heisembrittle* v. *City Council*, 2 McMull. (S. C.) 233. See, also, *State* v. *Clark*, 28 N. H. 176; *State* v. *Freeman*, 38 id. 426; *Megowan* v. *Commonwealth*, 2 Metc. (Ky.) 3. But a "general welfare" clause confers no authority upon a municipal corporation to make an ordinance prohibiting the retail of intoxicating liquors, when this is repugnant to the State laws on the subject. *Ex parte Burnett*, 30 Ala. 461; *Commonwealth* v. *Turner*, 1 Cush. 493.

Where the legislature confers the power to suppress groceries where

liquor is sold, or to regulate, license, and restrain the same, it is a matter purely discretionary whether or not the city will wholly prohibit its sale, or license and regulate the traffic. *Schwuchow* v. *Chicago*, 68 Ill. 444. So, under a power given by charter to "restrain and prohibit tippling houses," a corporation was held to be authorized to impose a license fee. *St. Louis* v. *Smith*, 2 Mo. 113. And power to "tax" and "restrain" the sale of liquors is held to include the power to grant licenses. *Mt. Carmel* v. *Wabash County*, 50 Ill. 69. See *Leonard* v. *Canton*, 35 Miss. 189. But the power "to prohibit tippling houses" does not give authority to enact an ordinance prohibiting the sale of beer by brewers. *Strauss* v. *Pontiac*, 40 Ill. 301.

Where the charter of a municipal corporation gives the common council power to license inns and taverns, and also power to license wholesale liquor dealers, liquor cannot be sold by the quart without license, in violation of a city ordinance. *Roberson* v. *City of Lambertville*, 38 N. J. Law, 69.

A city ordinance taxing "every owner of a wagon or other vehicle, kept or used for free delivery of goods to customers or others in the city," was held to impose the tax on drays, belonging to iron works situated outside the city limits, but used for delivery of their wares within the city. *City of Memphis* v. *Battaile*, 8 Heisk. (Tenn.) 524.

§ 16. **Levying taxes, etc.** Municipal corporations have no inherent power of taxation. Their right to tax is by delegation from the State. *Daily* v. *Swope*, 47 Miss. 367; *Bull* v. *Read*, 13 Gratt. (Va) 78, 98; *Waterhouse* v. *Board, etc.*, 8 Heisk. 857; *Wheatly* v. *City of Covington*, 11 Bush (Ky.), 18; *Alexander* v. *Baltimore*, 5 Gill (Md.), 383, 393; *Brodhead* v. *Milwaukee*, 19 Wis. 624; *City of Richmond* v. *Richmond, etc., R. R. Co.*, 21 Gratt. 604. But the legislature may confer the taxing power upon municipalities in such measure as it deems expedient, subject, however, to the limitation that it cannot confer any greater power than the State itself possesses, and it must observe the restrictions and limitations of the organic law. *Osborne* v. *Mobile*, 44 Ala. 493; *Bradley* v. *McAtee*, 7 Bush (Ky.), 667; S. C., 3 Am. Rep. 309; *O'Donnell* v. *Bailey*, 24 Miss. 386; *Alexander* v. *Baltimore*, 5 Gill (Md.), 383; *State* v. *Linn County Court*, 44 Mo. 504; *Primm* v. *City of Belleville*, 59 Ill. 142. The authority must be given either in express words, or by necessary implication, and it cannot be collected by doubtful inferences from other powers, or powers relating to other subjects, nor deduced from any consideration of convenience or advantage. *St. Mary's Industrial School* v. *Brown*, 45 Md. 310.

In the absence of any constitutional restriction, it is held that the

legislature may confer authority upon a municipal corporation to levy and collect *retrospective* taxes, and for this purpose the assessment rolls of a previous year may be used. *New Orleans* v. *Poutz*, 14 La. Ann. 853. And see *Tallman* v. *Janesville*, 17 Wis. 71. But it has been held that the legislature cannot authorize a municipal corporation to tax, for its own local purposes, lands lying beyond the corporate limits. *Wells* v. *City of Weston*, 22 Mo. 384. But see *Langhorne* v. *Robinson*, 20 Gratt. 661; *Waterville* v. *County Commissioners*, 59 Me. 80.

The constitution of the United States prohibits the States from levying any duty on *tonnage*, without the consent of congress. See U. S. Const., art. 1, § 10, ch. 1. But the assessment of a vessel owned in a city, by the city assessor, for city taxes, is held not to be a "duty of tonnage" within the meaning of the constitution. *The North Cape*, 6 Biss. (C. C.) 505.

The courts of the United States can impart no taxing power to a municipal corporation, and an attempt by them to compel by *mandamus* the levy of a tax not authorized by the laws of the State would be an abuse of the writ. *Vance* v. *City of Little Rock*, 30 Ark. 435.

That the legislature may constitutionally confer upon municipal corporations the power to make local improvements, such as grading and paving or otherwise improving streets and sidewalks, constructing drains, sewers, and the like, at the expense of the adjoining proprietors, is said to be as firmly established as any other doctrine of American law. *Palmer* v. *Morton*, 25 Mo. 593. And see *Stroud* v. *Philadelphia*, 61 Penn. St. 255; *Matter of Van Antwerp*, 56 N. Y. (11 Sick.) 261; *Willard* v. *Presbury*, 14 Wall. 676; *City of Newark* v. *State*, 34 N. J. Law, 523; *Woodhouse* v. *Burlington*, 47 Vt. 301; *Morange* v. Mix, 44 N. Y. (5 Hand) 315; *Moale* v. *Baltimore*, 5 Md. 314; *Gilkeson* v. *Justices*, 13 Gratt. (Va.) 577; *Cleveland* v. *Wick*, 18 Ohio St. 303; *Hoyt* v. *City of Saginaw*, 19 Mich. 39; S. C., 2 Am. Rep. 76; *Sinton* v. *Ashbury*, 41 Cal. 525; *Johnson* v. *Milwaukee*, 40 Wis. 315; *Allen* v. *Drew*, 44 Vt. 174. It is likewise held to be competent for the legislature, in the absence of special restriction, to require the abutters to pay the cost of the improvement in front of their respective lots, instead of having the whole expense of the improvement assessed or apportioned among all, on the basis of *frontage*, or of *benefits*. *Warren* v. *Henly*, 31 Iowa, 31; *Weeks* v. *Milwaukee*, 10 Wis. 242, 258. And see *Hill* v. *Higdon*, 5 Ohio St. 243. But see *Woodbridge* v. *Detroit*, 8 Mich. 274, in which case the court were equally divided on the question. And see Cooley's Const. Lim. 508.

Where a city charter requires property to be assessed to pay for improvements according to the *benefits received*, it is not sufficient to

assess each lot according to its frontage. The commissioners must exercise their judgment as to the amount of benefit each lot receives, and must assess the property accordingly, and the report must show that the assessment has been so made. *State* v. *City of Hudson*, 5 Dutch. (N. J.) 104; *State* v. *Town of Bergen*, id. 266. The general rule is to consider the effect of the improvement upon the market value of the property, and to make the assessment in view of that fact, without regard to the present use or the purpose of the owner in relation to its future enjoyment. *People* v. *Mayor*, 63 N. Y. (18 Sick.) 291. Nor does the requirement of the statute that "each lot shall be charged in proportion to the *frontage* thereof" contemplate that the work in front of each lot shall be necessarily charged to that lot, but that the amount of the whole work shall be ascertained, and each lot shall be charged in the proportion that its frontage bears to that of all the lots. *Neenan* v. *Smith*, 50 Mo. 525. As to the distinction between "benefits," and "frontage," see *Clapp* v. *Hartford*, 35 Conn. 66, 79.

An authority to "prescribe by ordinance that paving of streets and of footways should be done at the expense of the owners of ground" fronting them, does not confer upon a city the power to tear up a pavement which is good and in no need of repair, and to relay and charge the owner again with one excessively costly. *Wistar* v. *Philadelphia*, 80 Penn. St. 505; S. C., 21 Am. Rep. 112. But a general power to pave implies a power to repair and repave when the condition of the cartway or footway requires it, and of this, *prima facie*, the municipal authorities may judge. *McCormack* v. *Patchin*, 53 Mo. 33; S. C., 14 Am. Rep. 440; *Williams* v. *Detroit*, 2 Mich. 560; *Gurnee* v. *Chicago*, 40 Ill. 165; *Municipality* v. *Dunn*, 10 La. Ann. 57. And see *Broadway Baptist Church* v. *McAtee*, 8 Bush (Ky.), 508; S. C., 8 Am. Rep. 480; *Bradley* v. *McAtee*, 7 Bush (Ky.), 667; S. C., 3 Am. Rep. 309. So, it is held that the power to pave includes the power to *gravel* streets. *Burnham* v. *Chicago*, 24 Ill. 496. And the expense of *grading* a street preparatory to paving is incident to paving, and may properly be included in the assessment. *State* v. *Elizabeth*, 1 Vroom (N. J.), 365. See, also, *McNamara* v. *Estes*, 22 Iowa, 246. And abutters may be assessed for paving street *crossings*. *Creighton* v. *Scott*, 14 Ohio St. 438. See *Hines* v. *City of Lockport*, 41 How. (N. Y.) 435; S. C., 60 Barb. 378; 5 Lans. 16; S. C. affirmed, 50 N. Y. (5 Sick.) 236.

In Pennsylvania it is held that the legislature has no authority to compel the owners of farm lands, lying within one mile on each side of a public highway, to pay for grading, macadamizing and improving

it, by an assessment upon their lands by the acre. *Washington Avenue*, 69 Penn. St. 352; S. C., 8 Am. Rep. 255.

A statute, enacted by the legislature of Kansas, authorized towns to issue bonds to raise money "for the purpose of providing the destitute citizens of such townships with provisions and with grain for seed and feed,"—the object being to relieve farmers whose crops had been destroyed,—and the authority was held to be unconstitutional, in not being conferred for a public purpose. *State* v. *Oswakee Township*, 14 Kans. 418; S. C., 19 Am. Rep. 99. See, also, *Lowell* v. *City of Boston*, 111 Mass. 454; S. C., 15 Am. Rep. 39, 56; *Loan Association* v. *Topeka* 20 Wall. (U. S.) 655.

A charitable corporation, which is, by its charter, "exempted from taxation of every kind," is not exempted from special assessments against its property for improvements in a street on which it abuts. *Sheehan* v. *Good Samaritan Hospital*, 50 Mo. 155; S.C., 11 Am. Rep. 412. So a general statute, which provides for the exemption from assessment and taxation of property used for religious purposes, does not exempt such property from assessments for local improvements. *First Presbyterian Church* v. *Fort Wayne*, 36 Ind. 338; S. C., 10 Am. Rep. 35; *Pray* v. *Northern Liberties*, 31 Penn. St. 69; *Broadway Baptist Church* v. *McAtee*, 8 Bush (Ky.), 508; S. C., 8 Am. Rep. 480; *Matter of the Mayor, etc.*, 11 Johns. 77. So, the exemption of property of a cemetery company from "any tax or public imposition whatever," does not exempt it from a paving tax for improving a street in front of the property. *Baltimore* v. *Cemetery Company*, 7 Md. 517. And see *St. Louis Public Schools* v. *St. Louis*, 26 Mo. 468; *Paterson* v. *Society, etc., for Useful Manufactures*, 4 Zabr. (N. J.) 385; *Lafayette* v. *Male Orphan Asylum*, 4 La. Ann. 1; *Brightman* v. *Kirner*, 22 Wis. 54; *Paine* v. *Spratley*, 5 Kans. 525.

The power of the State to tax trades, professions, and occupations, is unquestioned (*Simmons* v. *State*, 12 Mo. 268; *Mason* v. *Lancaster*, 4 Bush [Ky.], 406; *Keiler* v. *State*, 11 Md. 525; *Gilkeson* v. *Justices*, 13 Gratt. 577; *Nashville* v. *Althrop*, 5 Coldw. [Tenn.] 554); and this authority may be delegated to municipal corporations, but it should be done in clear and unambiguous terms. *St. Louis* v. *Laughlin*, 49 Mo. 559. An authority conferred on a city to collect taxes on "auctioneers, transient dealers, and peddlers," will justify it in imposing a tax, either upon the amount of the sales of such persons, or in the form of a license upon the privilege of selling. *Carroll* v. *Mayor of Tuskaloosa*, 12 Ala. 173. Although a city ordinance imposing taxes speaks only of persons or firms doing business in the city, yet an incorporated company, as, for instance, a telegraph company doing business in the city, will be

deemed to be included. Corporations are to be deemed and taken as persons when the circumstances in which they are placed are identical with those of natural persons expressly included in a statute. *Western Union Telegraph Co.* v. *Richmond*, 26 Gratt. (Va.) 1. Thus, where authority was given to a village corporation "to raise money by a tax to be assessed upon the freeholders and inhabitants according to law," it was held that a banking corporation located and doing business in the village was an inhabitant, and taxable. *Ontario Bank* v. *Bunnell*, 10 Wend. 186. See, generally, as to taxation of banks and bank stock by municipal corporations, *Madison* v. *Whitney*, 21 Ind. 261; *Nashville* v. *Thomas*, 5 Coldw. (Tenn.) 600; *Gordon* v. *Baltimore*, 5 Gill (Md.), 231; *O'Donnell* v. *Bailey*, 24 Miss. 386; *State* v. *Dowling*, 50 Mo. 134. As to the liability of railroads, their property and stock, to municipal taxation in the towns and cities where situated, see *Sangamon, etc., R. R. Co.*, 14 Ill. 163; *Providence, etc., R. R. Co.* v. *Wright*, 2 R. I. 459; *Elizabethtown, etc., R. R. Co.* v. *Trustees of Elizabethtown*, 12 Bush (Ky.), 233; *Northern Indiana R. R. Co.* v. *Connelly*, 10 Ohio St. 159. As to liability under special statute or charter provisions, see *North Mo. R. R. Co.* v. *Maguire*, 49 Mo. 482, 490; *City of Richmond* v. *Richmond, etc., R. R. Co.*, 21 Gratt. 604; *Ordinary of Bibb Co.* v. *Central R. R., etc.*, 40 Ga. 646; *Dunleith, etc., Bridge Co.* v. *City of Dubuque*, 32 Iowa, 427. It is held by the supreme court of Iowa, that an action at law can be maintained by a city for the recovery of municipal taxes upon the property of a railroad, notwithstanding the legislature has provided a special remedy therefor. *City of Burlington* v. *Burlington & Mo. R. R. Co.*, 41 Iowa, 134; *City of Dubuque* v. *Illinois Central R. R. Co.*, 39 id. 56. But see *Perry* v. *Washburn*, 20 Cal. 318; *City of Camden* v. *Allen*, 2 Dutch. (N. J.) 398; *Lane County* v. *Oregon*, 7 Wall. 71; *Flournoy* v. *Jeffersonville*, 17 Ind. 169.

The power to tax, conferred upon municipal corporations, must be fairly and impartially exercised by the municipal authorities; and they have no power to discriminate, in taxing privileges, between merchants and manufacturers and other dealers residing without the corporation, and members of the same class residing within the corporate limits. Such discrimination is beyond the authority of either State or municipal legislation. *City Council* v. *State*, 2 Speers (S. C. Law), 719. And a municipal ordinance which attempts to create a discrimination in the matter of taxation between merchants selling by sample, and those doing business in a different manner, is without authority and void. *Mayor, etc., of Nashville* v. *Althrop*, 5 Coldw. (Tenn.) 554.

The power to create a municipal corporation carries with it the

power to fix the geographical boundaries thereof, and to change the same by extension or contraction. And while the courts will not interfere with the boundary limits, for the reason that mere extension, without the municipal imposition of taxation, is not in itself detrimental, yet they will control and limit the taxing power, whenever practicable, to that point or line where it ceases to operate beneficially to the proprietor in a municipal point of view. *Covington* v. *Southgate*, 15 B. Monr. (Ky.) 491; *Henderson* v. *Lambert*, 8 Bush (Ky.), 607; *Bradshaw* v. *Omaha*, 1 Neb. 16; *Langworthy* v. *Dubuque*, 16 Iowa, 271. It is therefore held that lands within a city kept and alone used for agriculture, and not capable of being used as city property, and not demanded for that purpose, nor possessing a value based upon adaptation for the purpose of dwellings or business, cannot be considered directly benefited by the fact of their being within the city limits, and shall not be taxed for general municipal purposes. *Durant* v. *Kauffman*, 34 Iowa, 194; *Buell* v. *Ball*, 20 id. 282. But see *Weeks* v. *Milwaukee*, 10 Wis. 242; *Kalbrier* v. *Leonard*, 34 Ind. 497; *Groff* v. *Mayor, etc.*, 44 Md. 67.

That the products of mines are personal property which may be taxed for municipal purposes, see *Virginia* v. *Chollar-Potosi, etc., Co.*, 2 Nev. 86.

ARTICLE IV.

OF CORPORATE LIABILITIES.

Section 1. In general. Municipal corporations are invested with certain powers, which, from their nature, are *discretionary;* such as the power to adopt regulations or by-laws for the management of their own affairs, or for the preservation of the public health, or to pass ordinances prescribing and regulating the duties of policemen and firemen, and for many other useful and important objects within the scope of their charters. Such powers are generally regarded as discretionary, because, in their nature, they are *legislative;* and although it is the duty of such corporations to carry out the powers so granted and make them beneficial, yet it has never been held that an action would lie against the corporation, at the suit of an individual, for a failure on their part to perform such a duty. *Barton* v. *City of Syracuse*, 37 Barb. 292; S. C. affirmed, 36 N. Y. (9 Tiff.) 54; *Commissioners* v. *Duckett*, 20 Md. 468; *Weightman* v. *Corporation of Washington*, 1 Black (U. S.), 39. But where a duty of general interest is enjoined, and it appears that the burden was imposed in consideration of the privileges granted and enjoyed, and the means to perform the duty

are placed at the disposal of the corporation, they are clearly liable to the public if they unreasonably neglect to comply with the requirement of the charter. And when all the foregoing conditions concur, like individuals, they are also liable for injuries to person or property arising from neglect to perform the duty enjoined, or from negligence and unskillfulness in its performance. Id. And see *ante*, 595, art. 1, § 1, and cases cited.

§ 2. **Liability for acts of officers or agents.** See *ante*, 595, 602, art. 1, § 1; art. 3, § 1. See, also, tit. *Master and Servant.* A distinction is made between the liability of municipal corporations for acts of its officers, in the exercise of powers which it possesses for *public* purposes, and which it holds as part of the government of the country, and those which are conferred upon it for *private* purposes. Within the sphere of the *former*, it enjoys the exemption of government from responsibility for its own acts and the acts of its officers deriving their authority from the sovereign power; while, in the *latter*, it is answerable for the acts of those who are in law its agents. *Stewart* v. *New Orleans*, 9 La. Ann. 461. And see *Maxmilian* v. *Mayor*, 62 N. Y. (17 Sick.) 160; S. C., 20 Am. Rep. 468; *ante*, 595, art. 1, § 1. Thus, a city, under power given by its charter, appointed an inspector of stationary steam-boilers within the city, and passed a by-law imposing a penalty on any person who should use such a boiler without first having it tested by the inspector, and it was held that the city in making the appointment was in the discharge of a *public*, and not a *private* duty, and that the duties of the inspector were public duties, and, therefore, that the city was not liable for damage resulting from the negligence of the inspector in the discharge of his duties. *Mead* v. *City of New Haven*, 40 Conn. 72; S. C., 16 Am. Rep. 14. See, also, *Fisher* v. *Boston*, 104 Mass. 87; S. C., 6 Am. Rep. 196. But a city, like a private corporation, is held responsible for the act of its agents in borrowing money, since that act involves no exercise of sovereign power. *De Voss* v. *Richmond*, 18 Gratt. (Va.) 338.

§ 3. **Liability of, on contracts.** Municipal corporations are liable upon their *authorized* contracts, made by the proper officers or agents, in the same manner, and to the same extent as private corporations or natural persons. But their *unauthorized* contracts are void (see *ante*, 602, art. 3, § 1) and in actions thereon, the corporation may successfully interpose the plea of *ultra vires.* *Hood* v. *Lynn*, 1 Allen, 103; *Burrill* v. *Boston*, 2 Cliff. (C. C.) 590; *Perry* v. *Superior City*, 26 Wis. 64; *Siebrecht* v. *New Orleans*, 12 La. Ann. 496; *Sillcocks* v. *Mayor*, 11 Hun (N. Y.), 431; *Gamble* v. *Village of Watkins*, 7 id. 448; *Vincent* v. *Nantucket*, 12 Cush. 103; *Hard* v. *City of Decorah*,

43 Iowa, 313. Nor is a municipal corporation bound by contracts within the scope of its chartered powers, if made by officers or agents not thereunto duly authorized. *Boom* v. *City of Utica*, 2 Barb. 104. And see *Bradley* v. *Ballard*, 55 Ill. 413, 420; 8 Am. Rep. 656; *Hodges* v. *Buffalo*, 2 Denio, 110; *Smith* v. *City of Albany*, 61 N. Y. (16 Sick.) 444; *Fox* v. *New Orleans*, 12 La. Ann. 154.

But where such a corporation, in dealing with individuals, assumes powers upon which the validity of its acts depends, and subsequently it turns out that it does not possess the specific powers relied on, it is not thereby excused from performance of its obligations, if they can be performed through the agency of other powers which it does possess. *Maher* v. *City of Chicago*, 38 Ill. 266. See *City of Chicago* v. *People*, 48 id. 416. So, the opinion has been expressed that where a series of contracts has been openly made by the officers of a municipal corporation within the knowledge of the corporators who have acquiesced in, and derived benefit from them, the contracts are binding on the corporation, although not expressly authorized in its charter. *Allegheny City* v. *McClurkan*, 14 Penn. St. 81. But see *Loker* v. *Brookline*, 13 Pick. 343.

Assumpsit may be maintained against a municipal corporation in certain cases upon an implied promise. See *Township of Norway* v. *Township of Clear Lake*, 11 Iowa, 506; *Pimental* v. *San Francisco*, 21 Cal. 351; *Town of Lemington* v. *Blodgett*, 37 Vt. 215; *Harlem Gas Light Co.* v. *Mayor, etc., of New York*, 3 Robt. (N. Y.) 100; S. C. affirmed, 33 N. Y. (6 Tiff.) 309. Thus, if a city sells its void bonds, there is an implied *assumpsit* to repay the purchase-money. *Paul* v. *Kenosha*, 22 Wis. 266. So, a city has been held liable for gas furnished to it with knowledge of the council, though no ordinance or resolution was passed authorizing it to be furnished. *Gas Company* v. *San Francisco*, 9 Cal. 453. A city was likewise held liable under its charter upon an implied *assumpsit* to collect and pay over assessments awarded to property owners, for the opening of a street. *Wheeler* v. *Chicago*, 24 Ill. 105. And a contract was implied on the part of a city, which was bound to support its paupers and which had refused to pay a person who had furnished a pauper with necessaries. *Seagraves* v. *Alton*, 13 Ill. 366. See, also, *Frankfort Bridge Co.* v. *City of Frankfort*, 18 B. Monr. (Ky.) 41. It is, however, held to be the better opinion, that a promise to pay can never be implied in a case where the corporation possesses no power to contract. *Burrill* v. *Boston*, 2 Cliff. (C. C.) 590, 596.

Actions against municipal corporations to recover back money, paid to them for taxes, are usually brought in *assumpsit* for money had and

received. *Supervisors* v. *Manny*, 56 Ill. 160. In order to maintain such actions, the tax or assessment must be illegal and void (*Cook* v. *Boston*, 9 Allen, 393; *First Ecclesiastical Society of Hartford* v. *Town of Hartford*, 38 Conn. 274; *Powers* v. *Sanford*, 39 Me. 183); and the payment must have been made upon *compulsion*, and not merely under *protest*. *Haines* v. *School District*, 41 Me. 246; *Jenks* v. *Lima Township*, 17 Ind. 326; *Town Council of Cahaba* v. *Burnett*, 34 Ala. 400. See *Baker* v. *Cincinnati*, 11 Ohio St. 534; *Elston* v. *Chicago*, 40 Ill. 514; *Morris* v. *Baltimore*, 5 Gill (Md.), 248; *Lincoln* v. *City of Worcester*, 8 Cush. 55. And the same principles apply to actions brought to recover back money paid for illegal license, taxes or fines imposed by a municipal court. Id.; *McKee* v. *Town Council*, Rice's (S. C.) L. 24; *Cook* v. *Freeholders*, 2 Dutch. (N. J.) 326.

A purchaser from a city corporation of its bonds, which are wholly void for want of power in the city to issue them, is entitled to recover back from the city the amount paid, as for a failure of the consideration, and in such case it is not necessary for the plaintiff to return or offer to return the void bonds before bringing suit. *Paul* v. *City of Kenosha*, 22 Wis. 266. So a purchaser of property from a municipal corporation under a void sale, who has acquired from the corporation by virtue of the sale neither title nor possession to the property, is not required to convey back or transfer either to the corporation prior to the commencement of an action to recover back the purchase-money. *Herzo* v. *San Francisco*, 33 Cal. 134.

Where a person is injured in passing over a defective bridge, which two municipal corporations are jointly bound to keep in repair, and recovers against one of the corporations, it may recover contribution from the other. *Armstrong County* v. *Clarion County*, 66 Penn. St. 218; 5 Am. Rep. 368.

§ 4. **Liability for negligence in general.** With respect to negligence, a well-settled distinction is made between the liability of a municipal corporation *proper*, made such by acceptance of a village or city charter, and the involuntary *quasi* corporations known as counties, towns, school districts, and the like. The liability of the former is greater than that of the latter, even when the latter are invested with corporate capacity and the power of taxation. *Hamilton County* v. *Mighels*, 7 Ohio St. 109; *Barnes* v. *District of Columbia*, 1 Otto (U. S.), 540. Thus, municipal corporations proper are held liable, without any statute expressly giving the action, for injuries caused by unsafe and defective streets. *Dewey* v. *Detroit*, 15 Mich. 309; *Smoot* v. *Mayor*, 24 Ala. 112; *Dayton* v. *Pease*, 4 Ohio St. 80; *Erie* v. *Schwingle*, 22 Penn. St. 384. On the other hand, the decisions are

almost uniform to the effect, that counties and other *quasi* corporations are not liable to private actions for the neglect of their officers in respect to highways, unless such liability be expressly declared by statute. *Bartlett* v. *Crozier*, 17 Johns. 439; *Eastman* v. *Meredith*, 36 N. H. 284; *Chidsey* v. *Canton*, 17 Conn. 475; *Mower* v. *Leicester*, 9 Mass. 247; *Browning* v. *City of Springfield*, 17 Ill. 143; *Soper* v. *Henry County*, 26 Iowa, 264; *Russell* v. *County of Devon*, 2 Term R. 671. See, also, *Bigelow* v. *Randolph*, 14 Gray, 541; *Bray* v. *Wallingford*, 20 Conn. 416; *Freeholders* v. *Strader*, 3 Harr. (N. J.) 108; *Van Eppes* v. *Commissioners*, 25 Ala. 460; *Treadwell* v. *Commissioners*, 11 Ohio St. 190.

§ 5. **Defective streets.** In this country there is no common-law obligation resting upon *quasi* corporations, such as counties and townships, to repair highways, streets, or bridges within their limits. And even when the duty to repair is enjoined upon them by statute, and they have the power to levy taxes therefor, they are not generally held liable to be sued civilly for damages caused by the neglect to perform the duty, unless the action be expressly given by statute. See cases cited above. See, also, *Pray* v. *Jersey City*, 32 N. J. Law, 394; *Granger* v. *Pulaski County*, 26 Ark. 37; *Waltham* v. *Kemper*, 55 Ill. 346; 8 Am. Rep. 652; *Bussell* v. *Town of Steuben*, 57 id. 35. But it is otherwise, as respects chartered cities or ordinary municipal corporations. *Browning* v. *Springfield*, 17 Ill. 143. They owe to the public the duty to keep their streets in a safe condition for use, even in the absence of an express statute imposing the duty; and they are held liable in a civil action for special injuries resulting from a neglect to perform this duty (Id.; *Sterling* v. *Thomas*, 60 id. 264; *Chicago* v. *Robbins*, 2 Black [U. S.], 418; *Clark* v. *Lockport*, 49 Barb. 580; *Erie City* v. *Schwingle*, 22 Penn. St. 384; *Blake* v. *St. Louis*, 40 Mo. 569; *Meares* v. *Wilmington*, 9 Ired. [N. C.] L. 73); provided, however, it appears upon a fair view of the charter or statutes, that the duty rests upon the municipal corporation, *as such*, and not upon it as an agency of the State, or upon its officers as independent public officers. See *ante*, 595, art. 1, § 1; *Winbigler* v. *City of Los Angeles*, 45 Cal. 36; *Pray* v. *Jersey City*, 32 N. J. Law, 394; *Detroit* v. *Blackeby*, 21 Mich. 84; S. C., 4 Am. Rep. 450.

And it may become liable for neglect to keep a street in safe condition, without any *formal* acceptance of it as a street. *Phelps* v. *City of Mankato*, 23 Minn. 276.

So, a municipal corporation is bound to keep its streets in a safe condition for travel in the ordinary modes, by night as well as by day,

and, in case of failure to do so, it is liable for damages resulting therefrom. *Mayor of Milledgeville* v. *Cooley*, 55 Ga. 17. And the agents of a municipal corporation charged with the duty of keeping its streets in repair and in suitable condition for public travel are bound to exercise an active vigilance in the performance thereof, and where a defect or obstruction of a street has existed for a sufficient time, so that it has become notorious to those traveling, and such agents have had full opportunity to learn of its existence, and to remedy the defect or remove the obstruction, the corporation is chargeable with notice thereof, and is liable for the consequences of its neglect to restore the street to a good condition. *Mayor, etc., of Atlanta* v. *Perdue*, 53 Ga. 607; *Todd* v. *City of Troy*, 61 N. Y. (16 Sick.) 506; *Chicago* v. *Hoy*, 75 Ill. 530; *Rosenberg* v. *City of Des Moines*, 41 Iowa, 415; *Cusick* v. *Norwich*, 40 Conn. 375. But the municipal corporation is not an insurer against accidents upon the streets. It is bound to keep its streets in a reasonable safe condition, but not *absolutely* so. *Rockford* v. *Hildebrand*, 61 Ill. 155; *Smith* v. *St. Joseph*, 45 Mo. 449; *Seward* v. *Milford*, 21 Wis. 485; *Williams* v. *Clinton*, 28 Conn. 264. Nor is a municipal corporation bound to keep all of its streets in good repair under all circumstances, but only such streets and parts of streets as are necessary for the convenience of the traveling public. *Craig* v. *City of Sedalia*, 63 Mo. 417. It has, therefore, been held that a city is not liable for injury to a carriage and horses resulting from a failure to improve a street which was not needed for the use or convenience of the public. *City of Henderson* v. *Sandefur*, 11 Bush (Ky.), 550. Nor is a city liable for an injury caused by the combined effect of the unsafe condition of a highway, and the unlawful and careless act of a third person. *Shepherd* v. *Chelsea*, 4 Allen, 113. And it is held that where a person is using a highway simply for the purpose of play, and is injured by reason of a defect therein, he cannot maintain an action to recover damages therefor against the city which is bound to keep the highway in repair. *Blodgett* v. *Boston*, 8 id. 237. And see *Chicago* v. *Starr*, 42 Ill. 174.

A municipal corporation, while acting within the scope of its authority in making excavations in a street for the purpose of opening or improving it, using proper care and skill, is not liable to a lot owner for an injury resulting to his buildings from the removal of the lateral support of the soil in the street. *City of Quincy* v. *Jones*, 76 Ill. 231; S. C., 20 Am. Rep. 243.

§ 6. **Defective sidewalks.** Sidewalks, when necessary to be constructed for public convience are parts of the streets, and with respect to them a similar duty is imposed as in the case of streets; and for an

injury resulting from a defective sidewalk, a city is liable in damages. *Cusick* v. *Norwich*, 40 Conn. 375; *Higert* v. *Greencastle*, 43 Ind. 574; *Durant* v. *Palmer*, 29 N. J. Law, 544. But the duty of the city is only to see that its sidewalks are *reasonably* safe for persons exercising ordinary care and caution. *City of Chicago* v. *McGiven*, 78 Ill. 347. And to render a city liable for injuries resulting from a defect therein, it must appear, either that the city had notice of the defect, or that it was a patent defect and had continued so long that notice might reasonably be inferred, or that the defect was one which, with reasonable and proper care, should have been ascertained and remedied. *Jansen* v. *City of Atchison*, 16 Kans. 358; *Hall* v. *Manchester*, 40 N. H. 410; *Dewey* v. *Detroit*, 15 Mich. 307; *Chicago* v. *McCarthy*, 75 Ill. 602; *Moore* v. *Minneapolis*, 19 Minn. 300. And see *Harriman* v. *Boston*, 114 Mass. 241. Where a city is under no legal obligation to cause its streets to be lighted for the security of travelers, mere notice to a lamp-lighter of a defect in a sidewalk does not warrant a finding that the city had notice thereof. *Monies* v. *Lynn*, 119 Mass. 273. But the rule that a city must have notice, actual or implied, of a defect in a sidewalk, before it can be held liable for an injury caused by the defect, has no application to a case where the ignorance of the defect is the result of a clear and unmistakable omission. Ignorance in such a case is itself negligence. *Boucher* v. *New Haven*, 40 Conn. 457. See, also, *Alexander* v. *Town of Mt. Sterling*, 71 Ill. 366.

Where it is made the duty of the municipal authorities to see that the sidewalks are kept reasonably clear of ice and snow, and they permit such an accumulation thereof as to constitute an obstruction to remain an unreasonable length of time, to the danger of travelers, the corporation is chargeable with negligence without proof of actual notice. *Todd* v. *City of Troy*, 61 N. Y. (16 Sick.) 506; affirming S. C., *sub nom. Mosey* v. *City of Troy*, 61 Barb. 580. See, generally, as to the liability of a city for ice and snow on a sidewalk, and what is reasonable care in removing it. *Landolt* v. *Norwich*, 37 Conn. 615; *Stone* v. *Hubbardston*, 100 Mass. 49; *Durkin* v. *City of Troy*, 61 Barb. 437; *Savage* v. *Bangor*, 40 Me. 176; *Hall* v. *Manchester*, 40 N. H. 410; *Collins* v. *Council Bluffs*, 32 Iowa, 324; 7 Am. Rep. 200; *Cook* v. *Milwaukee*, 24 Wis. 270; 1 Am. Rep. 183; 27 Wis. 191; *McLaughlin* v. *Corry*, 77 Penn. St. 109; 18 Am. Rep. 432; *McAuley* v. *Boston*, 113 Mass. 503.

It has been held that a structure, such as the cornice of a building, projecting over a street in a city in such a manner as to be dangerous to passers-by, is a nuisance which the corporate authorities may abate,

and if they fail so to do after notice of its dangerous character, the city will be liable to any one injured thereby. *Grove* v. *Fort Wayne*, 45 Ind. 429; S. C., 15 Am. Rep. 262. And see *Parker* v. *Macon*, 39 Ga. 725; *Norristown* v. *Moyer*, 67 Penn. St. 355. But it has been held in the New England States, in decisions based upon statutes prescribing the duties and liabilities of municipal corporations, that a town or city is not liable to one injured by a falling sign suspended over the sidewalk (*Jones* v. *Boston*, 104 Mass. 75; S. C., 6 Am. Rep. 194; *Hewison* v. *New Haven*, 37 Conn. 475; S. C., 9 Am. Rep. 342; *Taylor* v. *Peckham*, 8 R. I. 349; S. C., 5 Am. Rep. 578); nor for an injury caused to a foot passenger on a sidewalk, by the falling of an overhanging mass of snow and ice from the roof of a building not owned by the city, although it had so overhung the highway for more than twenty-four hours before the accident. *Hixon* v. *Lowell*, 13 Gray, 59. But the statute of Massachusetts is held to extend to injuries caused by defective awnings projected over the sidewalk, where the defect or want of repair in the projection is of such a nature as to render its continuance dangerous to the public safety. *Day* v. *Milford*, 5 Allen, 98.

Where the plaintiff was injured by falling at night from a sidewalk, into a sunken lot, the walk being out of repair and unguarded through the negligence of the city, it was held that the fact that the plaintiff was at the time intoxicated did not preclude a recovery for the injury, unless such intoxication contributed thereto; and that whether it did so contribute was a question of fact for the jury. *Healy* v. *Mayor of New York*, 3 Hun (N. Y.), 708; S. C., 6 N. Y. Sup. Ct (T. & C.) 92. And see *Stuart* v. *Machias Port*, 48 Me. 477; *Lovenguth* v. *Bloomington*, 71 Ill. 238; *Alger* v. *Lowell*, 3 Allen, 402; *Ditchett* v. *Spuyten Duyvil, etc., R. R. Co.*, 5 Hun (N. Y.), 165.

Municipal corporations are not liable to vindictive or exemplary damages for personal injuries growing out of *mere neglect* to keep a sidewalk in a safe condition. In order to justify such damages, the negligence of the authorities must be so gross as to be *willful*. *City of Chicago* v. *Kelly*, 69 Ill. 475. See *ante*, tit. *Damages*, Vol. 2.

§ 7. **Defective bridges.** See *ante*, Vol. 1, tit. *Bridges*. In this country, the power of municipal corporations to erect bridges, and their authority over them, are purely statutory; and there is no common-law responsibility resting upon such corporations as it respects the repair of bridges within their limits. See *Hill* v. *Supervisors of Livingston County*, 12 N. Y. (2 Kern.) 52. But where bridges are part of the streets, and built by the municipal authorities under powers given

to them by the legislature, they are liable for defects therein, on the same principles and to the same extent as for defective streets and sidewalks. *Manderschid* v. *Dubuque*, 29 Iowa, 73; 4 Am. Rep. 196; *Krause* v. *Davis County*, 44 id. 141; *Smoot* v. *Wetumpka*, 24 Ala. 112; *Chicago* v. *McGinn*, 51 Ill. 266; S. C., 2 Am. Rep. 295; *State* v. *Supervisors of Wood County*, 41 Wis. 28; *Griffin* v. *Town of Williamstown*, 6 W. Va. 312; Dill. on Mun. Corp., § 579. But a city is under no legal obligation to make approaches, for the convenience of its citizens, to a bridge built by a corporation within the city limits. *Joliet* v. *Verley*, 35 Ill. 58. If, however, such approaches are voluntarily constructed by the city, they must be made safe for travelers, and the city is liable in damages for an accident caused by their defective condition. Id. And see *Daniels* v. *Intendent, etc., of Athens*, 55 Ga. 609, which holds that a contiguous embankment necessary to make access to a bridge so as to pass teams and wagons over it is a part of the bridge, and title to the bridge covers such an embankment.

§ 8. **Excavations or obstructions.** A municipal corporation which has caused an excavation to be made in its streets, and neglects to keep proper lights and guards around it in the night, is liable to persons receiving injury therefrom, and its liability is not varied by the consideration that it has or has not contracted with the persons doing the work to adopt such precautions. *Storrs* v. *Utica*, 17 N. Y. (3 Smith) 104. And see *King* v. *New York Central, etc., R. R. Co*, 66 N. Y. (21 Sick.) 181. But a city is not liable for an injury to a person caused by falling into an excavation in a sidewalk made by the owner of an adjoining lot, and not by the officers or agents of the city, left open, unguarded, without barriers or lights, in the night-time, where no notice of the condition of such excavation was had by the city, and no facts existed from which notice to the city might reasonably be inferred. *Fort Wayne* v. *De Witt*, 47 Ind. 391.

Cellar doors opening out on the sidewalk, and frequently and negligently kept or left open, endanger the use of the sidewalk, and the city is liable to persons falling into them and injured thereby, if it has notice of such negligent use of the cellars. If such use has continued a long time, notice will be presumed, and the city is chargeable therewith without actual proof of notice. *Smith* v. *City of Leavenworth*, 15 Kans. 81; *Chapman* v. *Mayor of Macon*, 55 Ga. 566. See, further, as to liability of cities for injuries from excavations, *Bassett* v. *St. Joseph*, 53 Mo. 290; 14 Am. Rep. 446; *Tallahassee* v. *Fortune*, 3 Fla. 19; *Davenport* v. *Ruckman*, 10 Bosw. (N. Y.) 20; S. C., 16 Abb. Pr. 341.

Neither of the joint owners of a wall can recover damages from a

municipal corporation for the falling thereof, by reason of excavations made by consent of the other, in the work of grading a street. *Mitchell* v. *Mayor, etc., of Rome*, 49 Ga. 19; 15 Am. Rep. 669. Nor is a municipal corporation liable for damages resulting from the digging of a trench in one of its public streets, by a private individual, under a license from the corporate authorities, for the purpose of making a connection with the main conduit pipes for distributing water to the inhabitants, and neglecting properly to fill up the same. *West Chester* v. *Apple*, 35 Penn. St. 284. And see *Pfau* v. *Williamson*, 63 Ill. 16; *Dorlon* v. *Brooklyn*, 46 Barb. 604; *Burnham* v. *Boston*, 10 Allen, 290; *Norwich* v. *Breed*, 30 Conn. 535.

In the New England States, towns and cities are obliged by statute to keep their highways and streets in repair and it is there held that where railroad companies are authorized by law to construct their roads over public highways and streets, and a person is injured by reason of a defective highway or street thus occasioned, the town or city is primarily responsible to such person, leaving it to seek indemnity from the railroad company. See *Willard* v. *Newbury*, 22 Vt. 458; *Currier* v. *Lowell*, 16 Pick. 170; *Phillips* v. *Veazie*, 40 Me. 96; *Barber* v. *Essex*, 27 Vt. 62. And see *Kittredge* v. *Milwaukee*, 26 Wis. 46. The person injured may, however, elect to proceed at once against the railroad company. *Elliott* v. *Concord*, 27 N. H. 204; *Lowell* v. *Railroad Company*, 23 Pick. 24.

It is held under the New Hampshire statute, that a structure which for some years obstructs the safe and convenient use of a highway in a city renders the city liable to indictment for not keeping the highway "in good repair and suitable for the travel passing thereon." *State* v. *Dover*, 46 N. H. 452.

In general, a municipal corporation is not liable for the acts of its inhabitants in obstructing its streets, when notice of such obstruction is not shown to have been received by its officers, nor is presumed, from lapse of time. *Dorlon* v. *City of Brooklyn*, 46 Barb. 604; *Griffin* v. *Mayor of New York*, 9 N. Y. (5 Seld.) 456.

§ 9. **Improper sewers.** The entire omission to construct a sewer, or the failure to make it of sufficient size, has been held not to create a liability on the part of a municipal corporation, for the reason that the duty of determining where sewers shall be located and their dimensions is, in its nature, *judicial*. *Mills* v. *Brooklyn*, 32 N. Y. (5 Tiff.) 489; *City Council* v. *Gilmer*, 33 Ala. 116; *Child* v. *Boston*, 4 Allen, 41; *Carr* v. *Northern Liberties*, 35 Penn. St. 324; *Dermont* v. *Detroit*, 4 Mich. 435. For the same reason it is held that after the corporation has constructed a sewer or drain, it may, in its discretion,

wholly abandon or discontinue it; and if the inhabitants are not left in any worse condition by such abandonment or discontinuance than they would be if such sewer or drain had never been made, the corporation will not be liable for any injury to individuals caused by the flow of surface water. *City of Atchison* v. *Challiss*, 9 Kans. 603. And see *Judge* v. *Meriden*, 38 Conn. 90; *Grant* v. *Erie*, 69 Penn. St. 420; 8 Am. Rep. 272; *Barry* v. *Lowell*, 8 Allen, 127; *Roll* v. *Indianapolis*, 52 Ind. 547. But where a sewer has been determined upon and is constructed, all the authorities agree that the duties of constructing it properly and keeping it in good condition and repair are *ministerial;* and that negligence in the performance of those duties will render the corporation liable for damages resulting therefrom. *Jones* v. *New Haven*, 34 Conn. 1; *Donohue* v. *Mayor of New York*, 3 Daly, 65; *Logansport* v. *Wright*, 25 Ind. 512; *McCarthy* v. *Syracuse*, 46 N. Y. (1 Sick.) 194; *Rowe* v. *Portsmouth*, 56 N. H. 291; 22 Am. Rep. 464; *Simmer* v. *City of St. Paul*, 23 Minn. 408; *Wallace* v. *Muscatine*, 4 Greene (Iowa), 373; *Savannah* v. *Waldner*, 49 Ga. 316; *Smith* v. *Mayor*, 66 N. Y. (21 Sick.) 295. Thus, where the water of a stream, which a riparian proprietor has been in the habit of using in his business, has become polluted by the emptying into it of city sewers, he can recover against the city for the pollution, so far as it is attributable to the improper construction or unreasonable use of the sewers, or to the negligence or other fault of the city in the care or management of them. *Merrifield* v. *Worcester*, 110 Mass. 216; 14 Am. Rep. 592. So, where the officers of a municipal corporation, in pursuance of a lawful authority, give permission to a lot owner to connect his lot with a sewer, such officers are required to exercise reasonable care to prevent injury, and for the omission thereof the corporation is liable. *Masterton* v. *Village of Mount Vernon*, 58 N. Y. (13 Sick.) 391. But in the absence of any want of proper care, upon the part of its officers, it is not responsible for the negligence of those employed by the lot owner to do the work. Id.

A city has no right, in constructing a sewer, to discharge the filth therefrom upon the premises of an individual, and if, in so doing, a private injury is sustained, it is liable in damages. *Jacksonville* v. *Lambert*, 62 Ill. 519. See, also, *O'Brien* v. *St. Paul*, 18 Minn. 176; *City of Chicago* v. *Brophy*, 79 Ill. 277; *Columbus* v. *Woolen Company*, 33 Ind. 435.

§ 10. **Injuries from flowing lands.** A municipal corporation has no authority under its general power to grade and improve streets, or make public improvements, to deprive others of their property rights in a natural water-course, or to injure them by badly constructed and

insufficient culverts or passage ways obstructing the free flow of the water, without incurring a liability therefor. *Gardner* v. *Newburgh*, 2 Johns. Ch. 162; *Stetson* v. *Faxon*, 19 Pick. 147, 158; *Town of Union* v. *Durkes*, 38 N. J. Law, 21; Dill. on Mun. Corp., § 797. And see *Dayton* v. *Pease*, 4 Ohio St. 80; *Rochester Lead Company* v. *Rochester*, 3 N. Y. (3 Comst.) 463; *Sleight* v. *City of Kingston*, 11 Hun (N. Y.), 594; *Parker* v. *Lowell*, 11 Gray, 353. Thus, in building a highway across a natural stream the corporation should provide for, and maintain, a free passage of the water, in order that it may not be obstructed and pent up so as to flow back on land belonging to the riparian proprietors. *Haynes* v. *Burlington*, 38 Vt. 350. See, also, *Mayor of Helena* v. *Thompson*, 29 Ark. 569. But the corporate authorities of a city are not liable for an injury to private property, caused by the insufficiency of erections to resist an *extraordinary* flood, if they had proved sufficient for all purposes for a number of years previous, and ordinarily careful and thoughtful men, and skillful engineers, would not have contemplated that such a flood would ever occur. *City of Madison* v. *Ross*, 3 Ind. 236; *Sprague* v. *Worcester*, 13 Gray, 193.

As it regards *surface* water, different principles are applicable, and it is held that no one has such an interest in mere surface-water arising from rains and melting snow, as to maintain an action for the diversion thereof from its ordinary course. *Wilson* v. *Mayor of New York*, 1 Denio, 597; *Bastable* v. *City of Syracuse*, 8 Hun (N. Y.), 587; *Town of Union* v. *Durkes*, 38 N. J. Law, 21. And where a city repairs its streets and constructs drains and sewers with proper skill and care, and without malice, it is not liable for any consequential injury, such as the flowing of waste water upon a citizen's land. *Vincennes* v. *Richards*, 23 Ind. 381 And see *Bangor* v. *Lansil*, 51 Me. 521; *Pontiac* v. *Carter*, 32 Mich. 164; *Pettigrew* v. *Evansville*, 25 Wis. 223; 3 Am. Rep. 50; *Ellis* v. *Iowa City*, 29 Iowa, 229; *Smith* v. *Mayor*, 66 N. Y. (21 Sick.) 295; *St. Louis* v. *Gurno*, 12 Mo. 414; *Adams* v. *Walker*, 34 Conn. 466. Nor will an action lie against a city for injury occasioned to land bounding on a public street, from the accumulation of water on the surface of the street which the city has *neglected to drain*. *Flagg* v. *Worcester*, 13 Gray, 601. See, also, *Aurora* v. *Pulfer*, 56 Ill. 270; *Roll* v. *Augusta*, 34 Ga. 326; *Atchison* v. *Challiss*, 9 Kans. 603.

It has, however, been held, that, if in grading a street the municipal corporation turns a stream of mud and water upon the premises of an adjoining property holder, or creates in the immediate neighborhood of his premises a pond, offensive and unwholesome to him or his

family, the corporation thereby becomes liable to him in damages to the extent of his injury. *Nevins* v. *Peoria*, 41 Ill. 502. So, if surface-water be collected into a single channel and cast in a large volume upon the land of an adjacent owner, it is held that he may maintain an action to recover the damages sustained thereby. *Bastable* v. *City of Syracuse*, 8 Hun (N. Y.), 587; *Kobs* v. *Minneapolis*, 22 Minn. 159; *Ashley* v. *Port Huron*, 35 Mich. 296. And see on this point *Foot* v. *Bronson*, 4 Lans. (N. Y.) 47; *Bentz* v. *Armstrong*, 8 Watts & Serg. 40; *Livingston* v. *McDonald*, 21 Iowa, 160; *Brine* v. *Great Western Railway Co.*, 110 Eng. Com. Law (2 Best & Sm.), 402.

§ 11. **Damage by fires.** A municipal corporation is not liable in damages to the owner of property consumed by fire, on the ground that it failed to keep cisterns filled with water, fire-hooks, etc., in repair, whereby a fire, which communicated with owner's property and occasioned the loss, might have been extinguished. *Patch* v. *City of Covington*, 17 B. Monr. (Ky.) 722. To authorize the recovery of damages for an act of omission or commission, the injury sustained must be the direct, or at least the proximate and natural consequence of the act complained of. Id. So, the power conferred upon a municipal corporation by its charter, to organize and regulate a fire department for the purpose of preventing and guarding against damage by fire, is a *legislative* or *judicial* one, and the failure of the corporate authorities to exercise the power to the full extent necessary to protect the citizens from such damages, does not render the corporation liable to an action therefor. *Brinkmeyer* v. *Evansville*, 29 Ind. 187; *Grant* v. *City of Erie*, 69 Penn. St. 420; S. C., 8 Am. Rep. 272; *Wheeler* v. *City of Cincinnati*, 19 Ohio St. 19; S. C., 2 Am. Rep. 363; *Heller* v. *Sedalia*, 53 Mo. 159; S. C., 14 Am. Rep. 444.

Nor is a municipal corporation liable, unless by express statute, for the destruction of a building torn down to arrest the progress of a fire, no matter whether done under the direction of the municipal officers who had no authority so to direct, or by the by-standers of their own motion. *McDonald* v. *Red Wing*, 13 Minn. 38. And see *Respublica* v. *Sparhawk*, 1 Dall. (Penn.) 357; *Field* v. *City of Des Moines*, 39 Iowa, 575; S. C., 18 Am. Rep. 46; *American Print Works* v. *Lawrence*, 3 Zabr. (N. J.) 590; affirming S. C., id. 9; 1 id. 248, 714; *Mayor of New York* v. *Lord*, 17 Wend. 285; S. C. affirmed, 18 id. 126. Nor, in the absence of express statute, is a municipal corporation liable for injuries occasioned by the negligence of a fireman while engaged in the discharge of his duties, although such fireman is employed and paid by the corporation (*Jewett* v. *City of*

New Haven, 38 Conn. 368; S. C., 9 Am. Rep. 382. And see *Fisher* v. *Boston*, 104 Mass. 87; S. C., 6 Am. Rep. 196; *Hayes* v. *Oshkosh*, 33 Wis. 310; 14 Am. Rep. 764); nor is it liable for damages caused by the acts of a voluntary association of firemen while engaged in extinguishing a fire within the corporate limits. *Torbush* v. *City of Norwich*, 38 Conn. 225; S. C., 9 Am. Rep. 395.

§ 12. **Liability for torts or wrongs.** No rule can be so precisely stated as to embrace all the torts for which a private action will lie against a municipal corporation. All that can be done with safety is to determine each case as it arises. *Lloyd* v. *Mayor of New York*, 5 N. Y. (1 Seld.) 369. And see *Richmond* v. *Long*, 17 Gratt. 375; *Little Rock* v. *Willis*, 27 Ark. 572; *Mersey Docks and Harbour Board* v. *Penhallon*, 7 H. & N. 329. It is, however, well settled that such corporations fall within the operation of the general rule of law that the superior or employer must answer civilly for the negligence or want of skill of his agent or servant in the course or line of his employment, by which another is injured. *Johnson* v. *Municipality No. One*, 5 La. Ann. 100. But, to create such a liability, it is essential that the injurious act done must be within the scope of the corporate powers as prescribed by charter or positive enactment; in other words, it must not be *ultra vires*. *Mayor of Albany* v. *Cunliff*, 2 N. Y. (2 Comst.) 165; *Morrison* v. *Lawrence*, 98 Mass. 219; *Horn* v. *Baltimore*, 30 Md. 218; *Mitchell* v. *Rockland*, 52 Me. 118; *Cumberland, etc., Canal Co.* v. *Portland*, 62 id. 504; *Cole* v. *Nashville*, 4 Sneed (Tenn.), 162. See *ante*, tit. *Master and Servant*.

An action of tort lies against a city by the owner of land through which its agents have unlawfully made a sewer (*Hildreth* v. *Lowell*, 11 Gray, 345), or for trees destroyed and injuries done by them. *Walling* v. *Shreveport*, 5 La. Ann. 660. And, in general, a city is liable for special damages, inflicted upon private property by reason of the negligence or want of skill of persons employed by it to perform such duties and labor as are properly within its corporate province (*Templin* v. *Iowa City*, 14 Iowa, 59; *Memphis* v. *Lasser*, 9 Humph. [Tenn.] 757; *Lloyd* v. *Mayor of New York*, 5 N. Y. [1 Seld.] 369); and for damages occasioned by the tortious acts of municipal officers, done within the scope of their employment and ratified by their superiors. *Thayer* v. *Boston*, 19 Pick. 511; *Wilde* v. *New Orleans*, 12 La. Ann. 15. And see *Lee* v. *Sandy Hill*, 40 N. Y. (1 Hand) 442; *Soulard* v. *St. Louis*, 36 Mo. 546; *Sheldon* v. *Kalamazoo*, 24 Mich. 383; *Chicago* v. *McGraw*, 75 Ill. 566.

But a municipal corporation is not liable for the misfeasance of its officers, when the misfeasance is in respect to a duty specifically imposed by

statute on the officer; nor when the misfeasance is by officers over whom it has no control, and whose duties are to be performed as the representatives and for the purposes of the State government. *Ham* v. *Mayor of New York*, 5 Jones & Sp. (N. Y.) 458; *Sutton* v. *Board of Police*, 41 Miss. 236. And see *Connors* v. *Mayor*, 11 Hun (N. Y.), 439; *Maxmilian* v. *Mayor*, 62 N. Y. (17 Sick.) 160; S. C., 20 Am. Rep. 468; *Mead* v. *New Haven*, 40 Conn. 72; 16 Am. Rep. 14. Nor is a city liable for the negligence of its officers or agents in executing sanitary regulations adopted for the purpose of preventing the spread of contagious disease, or in taking the care and custody of persons afflicted with such disease, or the houses in which such persons are kept. In executing these legislative functions the city acts as a *quasi* sovereignty, and is not responsible to individuals for the negligence or non-feasance of its officers or agents. *Ogg* v. *City of Lansing*, 35 Iowa, 495; S. C., 14 Am. Rep. 499. And see *Russell* v. *Mayor of New York*, 2 Denio, 461; *Small* v. *Danville*, 51 Me. 359; *Rielly* v. *Philadelphia*, 60 Penn. St. 467. Nor is a city liable to an action for damages for the illegal arrest of a citizen by one of the police officers of the city (*Cook* v. *Mayor of Macon*, 54 Ga. 468; *Pesterfield* v. *Vickers*, 3 Coldw. [Tenn.] 205); nor for an assault and battery committed by its police officers (*Kimball* v. *Boston*, 1 Allen, 417); nor for their unlawful acts of violence (*Stewart* v. *New Orleans*, 9 La. Ann. 461; *Dargan* v. *Mobile*, 31 Ala. 469); nor for the act of the recorder in wrongfully refusing bail (*Ready* v. *Mayor, etc.*, 6 Ala. 327); nor for the neglect of the board of police commissioners, not appointed by, or responsible to the corporation. *Altvater* v. *Baltimore*, 31 Md. 462. See, also, *President, etc., of Odell* v. *Schroeder*, 58 Ill. 353; *Judge* v. *Meriden*, 38 Conn. 90. The remedy in such cases must be sought against the officers personally. *Cook* v. *Mayor of Macon*, 54 Ga. 468. Nor is a city corporation liable for injuries occasioned by the negligence of a contractor, in doing work under a contract between him and the city government (*Painter* v. *Pittsburgh*, 46 Penn. St. 213; *Pack* v. *New York*, 8 N. Y. [4 Seld.] 222), unless the relation of master and servant exists between them. *Barry* v. *St. Louis*, 17 Mo. 121. And where a city employed a contractor to grade a street, and in performing his contract he threw dirt, stone, etc., on a lot abutting the street, it was held that the city was not liable to the lot-holder for the injury. *Reed* v. *Alleghany City*, 79 Penn. St. 300.

Municipal corporations are not liable at common law to pay for the property of individuals destroyed by mobs or riotous assemblages (*Mayor of Baltimore* v. *Poultney*, 25 Md. 107); *Western College* v. *Cleveland*, 12 Ohio St. 375); but the legislature may constitutionally give a remedy, applicable in such case, and may regulate the mode of

assessing the damages. *Wing Chung* v. *Los Angeles*, 47 Cal. 531; *Sarles* v. *Mayor of New York*, 47 Barb. 447; *Atchison* v. *Twine*, 9 Kans. 350; *In re Pennsylvania Hall*, 5 Penn. St. 204; *Underhill* v. *Manchester*, 45 N. H. 214. See *City of Richmond* v. *Smith*, 15 Wall. 429.

A person who sustains a personal injury while aiding the police officers of a city at their request made in accordance with a city ordinance, in arresting violent disturbers of the peace, cannot sustain an action against the city for such injury. *Cobb* v. *Portland*, 55 Me. 381. Nor can a city corporation be held responsible for the negligence of its police officers in not taking proper care of a horse and carriage, where the driver has been arrested for fast driving. *Elliott* v. *Philadelphia*, 7 Phil. (Penn.) 128.

The general result of the numerous adjudications upon the liability of municipal corporations for the acts and omissions of their officers and agents is stated to be that where the officer or servant of a municipal corporation is in the exercise of a power conferred upon the corporation for its private benefit, and injury ensues from the negligence and misfeasance of such officer or servant, the corporation is liable in the case of private corporations or parties. But when the acts or omissions complained of were done or omitted in the exercise of a corporate franchise conferred upon the corporation for the public good, and not for private corporate advantage, then the corporation is not liable for the consequences of such acts or omissions on the part of its officers and servants. *Murtaugh* v. *St. Louis*, 44 Mo. 479. See, also, *Richmond* v. *Long*, 17 Gratt. 375; *ante*, 595, art. 1, § 1.

As to the remedy against municipal corporations, by writ of *mandamus*, see *ante*, tit. *Mandamus*.

In some cases, equity will interfere to prevent municipal authorities from transcending, or from making an illegal use of their powers, and will grant relief against their unauthorized or illegal acts; and this on the same principles by which it is guided in other cases. *Att.-Gen.* v. *Corp. of Plymouth*, 9 Beav. 67. And see tit. *Equity*, *ante*, Vol. 3. It has accordingly been held, that a court of equity possesses jurisdiction to give relief, where the owner has conveyed his property to a city corporation, for public purposes, in the confidence of receiving a compensation, which the corporation has failed to make. *Walker* v. *Charleston*, 1 Bailey's (S. C.) Eq. 443. So, in respect of property held by municipal corporations *in trust*, or clothed with public duties, equity has always asserted its jurisdiction to see that the trusts were performed and the public duties discharged. *Att.-Gen.* v. *Liverpool*, 1 Myl. & Cr. 171; Dill. on Mun. Corp., § 729. And see *Att.-Gen.* v. *Dublin*, 1 Bligh N. R. 312; *Att.-Gen.* v. *Detroit*, 26 Mich. 263; *Hatheway* v. *Sackett*,

32 id. 97; *Baltimore* v. *Baltimore & Ohio R. R. Co.*, 21 Md. 50. See, upon the subject of injunctions against municipal corporations, *ante*, tit. *Injunctions.* See, also, *Dean* v. *Charlton*, 23 Wis. 590; *Harney* v. *Indianapolis*, 32 Ind. 244; *Sherman* v. *Carr*, 8 R. I. 431; *Tash* v. *Adams*, 10 Cush. 252; *Holmes* v. *Jersey City*, 1 Beasl. (N. J.) 299; *Varick* v. *New York*, 4 Johns. Ch. 53; *Brown* v. *Trustees of Catlettsburg*, 11 Bush (Ky.), 435.

But, in general, a court of equity has no jurisdiction to restrain, review, or set aside, the proceedings of a municipal corporation, even if irregular or illegal. Except in special cases this jurisdiction belongs to the supervisory power and control of the courts of common law. *Mayor of Brooklyn* v. *Meserole*, 26 Wend. 132; *Bond* v. *Newark*, 19 N. J. Eq. 376; *Whiting* v. *Boston*, 106 Mass. 89; *Intendant* v. *Pippin*, 31 Ala. 542; *Hannewinkle* v. *Georgetown*, 15 Wall. 547.

ARTICLE V.

OF OFFICERS AND AGENTS.

Section 1. In general. In this country, the charter or constitution of a municipal corporation usually makes provision as to all the principal officers, such as mayor, aldermen, etc., and prescribes their various duties. See *State* v. *Von Baumbach*, 12 Wis. 310. And it is held that such a corporation cannot, without express authority from its charter, create an office, define its duties, and appoint an incumbent and clothe him with the powers of a municipal officer. *Hoboken* v. *Harrison*, 30 N. J. Law, 73. But see *People* v. *Bedell*, 2 Hill, 196. So, the provisions of the charter as to the time and mode of election of officers must be strictly observed, and an ordinance which is contradictory to the charter is unauthorized and void. *King* v. *Mayor of Weymouth*, 7 Mod. 373; *Vason* v. *Augusta*, 38 Ga. 542.

When the charter provides that the common council of a city shall "judge of the qualifications, elections, and returns of their own members," the council possesses the exclusive authority to pass on the subject, and courts have no jurisdiction to inquire into the qualifications, elections, or returns of members thereof. *People* v. *Metzker*, 47 Cal. 524.

Where the corporation has power under its charter to create an office by ordinance, and to appoint an incumbent thereto, it also has power to abolish the office. *Waldraven* v. *Memphis*, 4 Coldw. (Tenn.) 431. See, also, *People* v. *Mayor of New York*, 5 Barb. 43; *People* v. *Hill*, 7 Cal. 97. But see *Caulfield* v. *State*, 1 S. C. 461.

§ 2. **Powers of.** The executive head of a municipal corporation is usually styled the *mayor*, whose powers and duties in this country depend wholly upon the provisions of the charter or act of incorporation. His duties are properly executive and administrative, and he has no jurisdiction to try civil causes, unless conferred upon him by the act of incorporation. *Smith* v. *Deweese*, 41 Tex. 594. Sometimes he is clothed by statute with general power to administer, judicially, the laws of the State, and such a statute is not unconstitutional. See *Waldo* v. *Wallace*, 12 Ind. 569; *Howard* v. *Shoemaker*, 35 id. 111; *Prell* v. *McDonald*, 7 Kans. 426; 12 Am. Rep. 423; *Morrison* v. *McDonald*, 21 Me. 550. See, as to the authority of the mayor to employ force for the prevention or suppression of mobs, riots, etc., *Ela* v. *Smith*, 5 Gray, 121. As to his power to order the destruction of buildings, etc., in public places, see *Henderson* v. *Mayor*, 3 La. 563. A mayor, who in no sense belongs to the judiciary, may be authorized to arrest and fine lewd and disorderly women; and in so doing he but exercises the police power which in this respect has always been well distinguished from the judicial power, both in this country and in England. *Shafer* v. *Mumma*, 17 Md. 331.

So, the mayor has a summary jurisdiction to fine those who obstruct the public way, though he has no jurisdiction upon the question whether the *locus* is subject to a public right of way. *Warwick* v. *Mayo*, 15 Gratt. 528. And a mayor has no authority, unless expressly conferred by the city charter or ordinances, to employ counsel in behalf of the city. *Fletcher* v. *Lowell*, 15 Gray, 103.

The office of a *police officer* is the creature of statute, and such an officer can only exercise those powers conferred upon him by legislative authority, expressly or by implication. *Commonwealth* v. *Dugan*, 12 Metc. (Mass.) 233. And see *People* v. *Hurlburt*, 24 Mich. 44; 9 Am. Rep. 103; *Baltimore* v. *Board of Police*, 15 Md. 376; *Metropolitan Board of Health* v. *Heister*, 37 N. Y. (10 Tiff.) 661; *Police Commissioners* v. *Louisville*, 3 Bush (Ky.), 597. A city council may lawfully authorize police officers of the city to arrest *upon view*, and without warrant, any person in the act of violating city ordinances, made for the preservation of good order and public convenience, when not inconsistent with the general statutes or policy of the State (*White* v. *Kent*, 11 Ohio St. 550; *Thomas* v. *Village of Ashland*, 12 id. 124; *City Council* v. *Payne*, 2 Nott & McCord [S. C.], 475; *Butolph* v. *Blust*, 41 How. [N. Y.] 481; S. C., 5 Lans. 84); but not otherwise. *Pesterfield* v. *Vickers*, 3 Coldw. (Tenn.) 205. It is held in North Carolina that the violation of a town ordinance, even in the presence of a policeman,

does not necessarily give him a right to arrest the offender. *State* v. *Belk*, 76 N. C. 10.

When the municipal authorities of a city act under an authority derived from a statute, they must follow strictly its provisions. *Glass* v. *Ashbury*, 49 Cal. 571. And those who deal with the officers of a municipal corporation must ascertain, at their peril, that these officers are acting within the scope of their lawful powers. *Cheeney* v. *Town of Brookfield*, 60 Mo. 53.

It is held not to be in the power of a common council of a city to bind its legislative capacities by any private arrangement or stipulations, so as to disable itself from enacting any law that might be deemed essential for the public good. *Britton* v. *Mayor of New York*, 21 How. (N. Y.) 251; S. C., 12 Abb. 367, *n*; *Goszler* v. *Corporation of Georgetown*, 6 Wheat. (U. S.) 593.

§ 3. **Duties of.** Every municipal officer, before entering upon the duties of his office, is usually required to take an *oath* of office; and an officer intrusted with money or property is generally required, in addition, to give bond and sureties for the faithful performance of his duties. Thus, it is held that upon the choice of a collector of taxes, the town electing him may lawfully require sureties for the faithful discharge of the duties of his office, and the refusal to find such sureties is a non-acceptance of the trust, even after the person chosen has taken the oath of office. *Morrell* v. *Sylvester*, 1 Me. 248. But statutes requiring an oath of office and bond are usually *directory* in their nature; and while it is the duty of the officer elect to perfect his title by complying with the *directions* of the law as to taking oath, depositing bonds, etc., yet his failure to do so is his own wrongful neglect, and is no defense to an action against his sureties on his official bond. *State* v. *Toomer*, 7 Rich. (S. C.) 216; *State* v. *Findley*, 10 Ohio, 51. And see *Smith* v. *Cronkhite*, 8 Ind. 134; *Olney* v. *Pearce*, 1 R. I. 292. So, if officers, as for instance, the members of a common council, who are required to be sworn before they enter on the duties of their office, are wrongly sworn before a person not authorized to administer the oath, their acts are not therefore invalid; they are still officers *de facto*, and a tax levied by them is valid, and will not be set aside even in a direct proceeding. *State* v. *Perkins*, 4 Zabr. (N. J.) 409.

A law requiring commissioners for the assessment of a special tax to defray the expense of a certain public improvement, to take an oath, before proceeding to the assessment, that they will execute their duties to the best of their ability, is sufficiently complied with by their taking the oath after the ordinance requiring the improvement has been passed

by the common council, but before its approval by the mayor. *Gurnee* v. *Chicago*, 40 Ill. 165.

As to the right of a city to require a bond of indemnity from the owner, who proposes to make excavations in sidewalks for building purposes, etc., see *McCarthy* v. *Chicago*, 53 Ill. 38.

If a statute vests the discretion of deciding the places where work shall be done in improving the streets of a city, in a particular body of officers, those officers must make the decision personally. They cannot, by a general resolution, confide the duty to the superintendent of streets. *Richardson* v. *Heydenfeldt*, 46 Cal. 68.

§ 4. **Liabilities.** The officers of a municipal corporation cannot be held responsible in damages to the corporation for negligence in the discharge of their official duty, in the absence of a statute giving the remedy. If liable at all to the corporation from which they received their appointment, they are liable only for want of fidelity and integrity, and not for honest mistakes. *Wilson* v. *Mayor of New York*, 1 Denio, 595; *Trafton* v. *Alfred*, 15 Me. 258; *First Parish in Sherburne* v. *Fiske*, 8 Cush. 264.

As it regards their liability to others, it is held that they are individually liable for the payment of a judgment creditor of the corporation, after he has demanded, and they have refused, to levy a tax to raise the funds, if it is within their power to make such levy (*Porter* v. *Thomson*, 22 Iowa, 391); nor is it necessary, in such case, that the judgment creditor should demand the issue of scrip, as well as the levy of a tax. *Oswald* v. *Thedinga*, 17 id. 13.

So, a public or municipal officer, who is required to account for and pay over money that comes into his hands, is liable, though it be stolen without his fault, unless relieved from this responsibility by statute. *Halbert* v. *State*, 22 Ind. 125; *Morbeck* v. *State*, 28 id. 86; *State* v. *Harper*, 6 Ohio St. 607.

But public and municipal officers are not held personally liable on contracts made within the scope of their authority, and in the line of their duty, unless it clearly appears that they intended to bind themselves personally. *Macbeath* v. *Haldimand*, 1 Term R. 172; *Olney* v. *Wickes*, 18 Johns. 122; *Ogden* v. *Raymond*, 22 Conn. 379; *Nickerson* v. *Dyer*, 105 Mass. 320; *Tucker* v. *Shorter*, 17 Ga. 620.

Nor are public officers held responsible for the misconduct or malfeasance of such persons as they are *obliged* to employ, the maxim *respondeat superior* having no application in such cases. *Bailey* v. *Mayor of New York*, 3 Hill, 531; S. C., 1 N. Y. Leg. Obs. 163; S. C. affirmed, 2 Denio, 433; *Pritchard* v. *Keefer*, 53 Ill. 117. Nor are they liable, either civilly or criminally, for acts done within the scope

of their authority, in the exercise of a discretion confided to them by law, in the absence of malice, or corruption, or a statute imposing the liability. *Baker* v. *State*, 27 Ind. 485; *Stewart* v. *Southard*, 17 Ohio, 402; *Craig* v. *Burnett*, 32 Ala. 728; *State* v. *Dunnington*, 12 Md. 340. But public officers are liable in civil suits for damages done to individuals by their wanton, malicious, or fraudulent acts, and for acts beyond their jurisdiction. Id.; *Wilkes* v. *Dinsman*, 7 How. (U. S.) 89; *Waldron* v. *Berry*, 51 N. H. 137. And where the law requires absolutely a *ministerial* act to be done by a public officer, and he neglects or refuses to do such act, he may be compelled to respond in damages to the extent of the injury arising from his conduct, and mistake of duty, and honest intentions will not excuse the offender. *Amy* v. *Supervisors*, 11 Wall. (U. S.) 136; *Nowell* v. *Wright*, 3 Allen, 166; *Mills* v. *City of Brooklyn*, 32 N. Y. (5 Tiff.) 489.

So, a municipal corporation may be indicted at common law for a *mis*-feasance, as well as for *non*-feasance. *Commonwealth* v. *Proprietors, etc.*, 2 Gray, 339; *State* v. *Shelbyville*, 4 Sneed (Tenn.), 176; *Hammar* v. *Covington*, 3 Metc. (Ky.) 494; *State* v. *Hudson County*, 1 Vroom (N. J.), 137. And it is held in Tennessee, that the mayor and aldermen of a city, bound by law to keep the streets in repair, are personally liable to indictment if they neglect their duty. *Hill* v. *State*, 4 Sneed, 443. So, in Pennsylvania, where the duty of repairing the roads of a municipal district rests upon individuals, they are indictable for neglect to keep them in repair. *Phillips* v. *Commonwealth*, 44 Penn. St. 197. See, also, *State* v. *Raleigh*, 3 Jones' (N. C.) L. 399. But see *State* v. *Hudson County*, 1 Vroom (N. J.), 137.

§ 5. **Compensation.** There is no such relation between a municipal corporation and the officers which it is required by law to elect, as will oblige it to make compensation to them for the discharge of ordinary official duties, where no provision for any compensation is made by law, and in the absence of any contract. *Sikes* v. *Inhabitants of Hatfield*, 13 Gray, 347; *Garnier* v. *St. Louis*, 37 Mo. 554; *Barton* v. *New Orleans*, 16 La Ann. 317. A person accepting and entering into an office of a municipal corporation must be deemed to have notice of all the provisions of its charter, and can recover compensation for his services only in the manner therein provided. *Baker* v. *Utica*, 19 N. Y. (3 Smith) 326. And see *McClung* v. *St. Paul*, 14 Minn. 420; *Boyden* v. *Brookline*, 8 Vt. 284; *Jersey City* v. *Quaife*, 2 Dutch. (N. J.) 63; *Bladen* v. *Philadelphia*, 60 Penn. St. 464; *Smith* v. *Commonwealth*, 41 id. 335. Nor is a municipal corporation liable for services performed by an officer under an unconstitutional statute. *Meagher* v. *County of Storey*, 5 Nev. 244.

The relation between municipal corporations and their officers not being one of contract (*Alexander* v. *McKenzie*, 2 S. C. 81), the compensation of the latter may be changed from time to time during the continuance of their term of office, by the authority which fixed it. *Iowa City* v. *Foster*, 10 Iowa, 189. So, where a public office is created by the authorities of a municipal corporation, an incumbent of the office does not have such an interest in the salary as that the corporation cannot, at its discretion, abolish the office, and by so doing deprive him of his right to tender his services and demand his salary, for the full time for which he was elected. *Augusta* v. *Sweeny*, 44 Ga. 463; S. C., 9 Am. Rep. 172. See, also, *Madison* v. *Kelso*, 32 Ind. 79; *Commonwealth* v. *Bacon*, 6 Serg. & R. 322; *Hiestand* v. *New Orleans*, 14 La. Ann. 330. But when the services to be rendered are professional or private, rather than public or official, an employment under an ordinance for a fixed time, at a fixed salary, is held to be a contract, and not subject to be impaired by the corporation. *Chase* v. *Lowell*, 7 Gray, 33. And a superintendent of public schools was held to be entitled to recover from a city for his services during the year for which he was elected, although such services were rendered after the repeal of the ordinance requiring the school committee annually to appoint such superintendent. *Kimball* v. *Salem*, 111 Mass. 87. So, it is held that when neither the duties nor the compensation of a city solicitor are prescribed, it is his duty, unless otherwise instructed, to perform such services as the interests of the city may require, and he may recover therefor what they are reasonably worth. *Kinnie* v. *City of Waverly*, 42 Iowa, 486.

An increase by the municipal authorities of the duties of an officer of the corporation does not imply any obligation to increase his salary (*People* v. *Supervisors*, 1 Hill, 362; *Covington* v. *Mayberry*, 9 Bush [Ky.], 304; *Detroit* v. *Redfield*, 19 Mich. 376; *Evans* v. *Trenton*, 4 Zabr. [N. J.] 764); and a promise to pay him an extra fee or sum beyond that fixed by law is not binding. Id.; *Debolt* v. *Cincinnati*, 7 Ohio St. 237; *Heslep* v. *Sacramento*, 2 Cal. 580. And see *Smith* v. *City of Albany*, 61 N. Y. (16 Sick.) 444. But for services performed by request, not part of the duties of his office, and which could have been as appropriately performed by any other person, he may recover a proper remuneration. *Evans* v. *City of Trenton*, 4 Zabr. (N. J.) 764; *Converse* v. *United States*, 21 How. (U. S.) 463.

And where the duties of an employee of a municipal corporation do not absolutely require his presence every day at the office of another officer of the corporation, the fact that his omissions to be present are numerous, his attendance not being necessary to the faithful discharge of his duties, forms no defense to an action for his salary. *Whitney* v. *Mayor of New York*, 7 J. & Sp. (N. Y.) 106.

CHAPTER CI.

NEGLIGENCE.

ARTICLE I.

OF NEGLIGENCE IN GENERAL.

Section 1. Nature and definition. The term "negligence," in its legal acceptation, is nearly synonymous with carelessness. It is defined to be "the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do; or doing something which a prudent and reasonable man would not do." ALDERSON, B., in *Blyth* v. *Birmingham Water Works Co.*, 11 Exch. 781, 784. See, also, *Bizzell* v. *Booker*, 16 Ark. 308; *Railroad Company* v. *Jones*, 95 U. S. (5 Otto) 439; *Grant* v. *Moseley*, 29 Ala. 302; *Mowrey* v. *Central City Railway*, 66 Barb. 43. Or, as more briefly defined, "negligence is a violation of the obligation which enjoins care and caution in what we do." BEARDSLEY, C. J., in *Tonawanda R. R. Co.* v. *Munger*, 5 Denio, 255, 266. In negligence, there is an absence of proper attention, care, or skill; but whatever may be the grade of negligence, there is in it no *intention* to do a wrongful act, or to omit the performance of a duty. One may act in entire good faith and still be guilty of gross negligence. *Lincoln* v. *Buckmaster*, 32 Vt. 652. It is strictly *non*-feasance, not *mal*-feasance. This is the general idea, and it marks the distinction between negligence and fraud. In the first, there is no positive intention to do a wrongful act; but, in the latter, a wrongful act is ever designed and intended. Negligence, in its various degrees, ranges between pure accident and actual fraud, the latter commencing where negligence ends. *Gardner* v. *Heartt*, 3 Denio, 232, 236. But although even gross negligence does not, in construction of law, amount to fraud, yet it is evidence to be left to the jury, from which they may infer fraud, or the want of *bona fides*. *Wilson* v. *Railroad Co.*, 11 Gill & J. (Md.) 58. See, also, *Carlon* v. *Ireland*, 5 El. & Bl. 765; *Jones* v. *Smith*, 1 Hare, 71; *Seybel* v. *National Currency Bank*, 54 N. Y. (9 Sick.) 288; S. C., 13 Am. Rep. 583. And in *St.*

Louis, etc., R. R. Co. v. *Todd*, 36 Ill. 409, was gross negligence defined as "amounting to willful injury."

Practically, negligence is the want or absence of the care and attention required by all the circumstances of each particular case. It is not absolute or intrinsic, but is always relative to some circumstances of time, place, or person. *Richardson* v. *Kier*, 34 Cal. 63. Thus, in determining what constitutes negligence, consideration should be given to the growth of science, and the improvement in the arts. And it is the duty of those who use hazardous agencies to control them carefully, to adopt every known safeguard, and to avail themselves from time to time of every approved invention to lessen their danger to others. An omission in any of these respects is negligence. *Frankford, etc., Turnpike Co.* v. *Philadelphia, etc., R. R. Co.*, 54 Penn. St. 345; *Cleveland* v. *Spier*, 16 C. B. (N. S.) 399.

But the law is not so absurd as to assume to hold any one responsible upon the ground of negligence, for not doing that which it was practically, under the circumstances, impossible to do. *Michigan, etc., R. R. Co.* v. *Burrows*, 33 Mich. 6.

In the civil law, there are three degrees of negligence, described by the terms "slight," "ordinary," and "gross." Story on Bailm., § 18. This classification of negligence has been frequently recognized and applied in courts of common law (See *Vaughan* v. *Menlove*, 3 Bing. N. C. 468; *Purves* v. *Laudell*, 12 Cl. & Fin. 91; *Grill* v. *General Iron Screw Co.*, L. R., 1 C. P. 600; *Cashill* v. *Wright*, 6 El. & Bl. 891; *Edwards* v. *Lord*, 49 Me. 279; *Chase* v. *Maberry*, 3 Harr. [Del.] 266; *Farish* v. *Reigle*, 11 Gratt. [Va.] 697; *Spooner* v. *Mattoon*, 40 Vt. 300); but in other cases, the classification of negligence into degrees has been disapproved of, and it has been gravely doubted whether the terms of distinction could be usefully applied in practice. See *Wilson* v. *Brett*, 11 Mees. & W. 113; *Hinton* v. *Dibbin*, 2 Q. B. 646, 661; *New World* v. *King*, 16 How. (U. S.) 474; *Gill* v. *Middleton*, 105 Mass. 477; S. C., 7 Am. Rep. 548; *Smith* v. *New York Central R. R. Co.*, 24 N. Y. (10 Smith) 222, 241; *Western Union Tel. Co.* v. *Eyser*, 2 Col. T. 141. Slight negligence is defined to be the want of great care and diligence (Story on Bailm., § 17); ordinary negligence is the want of ordinary care and diligence (Id.; *Wyld* v. *Pickford*, 8 Mees. & W. 443, 461; *Pennsylvania R. R. Co.* v. *Ogier*, 35 Penn. St. 60; *Central R. R. Co.* v. *Moore*, 24 N. J. Law, 824); and gross negligence is the want of even slight care and diligence. Story on Bailm., § 17; *Cashill* v. *Wright*, 6 El. & Bl. 891, 899; *ante*, Vol. 2, 1. See *Goodman* v. *Walker*, 30 Ala. 482, 495. Great care or diligence implies the use of greater caution than men of average prudence

exercise with respect to their own affairs (*Dreher* v. *Fitchburg*, 22 Wis. 675; *Brown* v. *Lynn*, 31 Penn. St. 512); ordinary care or diligence is such as persons of average prudence observe with respect to their own affairs (*Heathcock* v. *Pennington*, 11 Ired. [N. C.] Law, 640; *Ernst* v. *Hudson River R. R. Co.*, 35 N. Y. [8 Tiff.] 9, 37. See *Central R. R. Co.* v. *Moore*, 24 N. J. Law, 824; *Cayzer* v. *Taylor*, 10 Gray, 274; *Toledo, etc., R. R. Co.* v. *Goddard*, 25 Ind. 185; *Philadelphia, etc., R. R. Co.* v. *Kerr*, 25 Md. 521); and slight care or diligence is such as is usually exercised by persons below the average prudence of the community in which they live, with respect to their own affairs. See *Dorman* v. *Jenkins*, 2 Ad. & El. 256; *Duff* v. *Budd*, 3 Brod. & B. 177; *Campbell* v. *Bear River Mining Co.*, 35 Cal. 679; *Schwartz* v. *Gilmore*, 45 Ill. 455; *Chase* v. *New York Central R. R. Co.*, 24 Barb. 273.

In determining what amounts to any specified degree of care in any particular case, the thing to be cared for, and the dangers to which it is exposed, are the principal considerations. That which would be ordinary care in the security and preservation of wearing apparel, might be gross carelessness in the disposition of gold coins or bank bills. The care must be graduated according to the character of the property, its value, and the convenience of its being made secure, the facility for its being stolen, and the temptations thereto. *State* v. *Meager*, 44 Mo. 356; *Heathcock* v. *Pennington*, 11 Ired. (N. C.) L. 640; *Fletcher* v. *Boston, etc., R. R. Co.*, 1 Allen, 9. So, a person driving in a crowded street is bound to the exercise of more care than is required if the street were clear. *Garmon* v. *Bangor*, 38 Me. 443. See, also, *McGrew* v. *Stone*, 53 Penn. St. 436; *Loomis* v. *Terry*, 17 Wend. 496. And in all cases where the safety of human life is in question, a higher degree of care is required, than is exacted in relation to any matter of mere property. See *Deane* v. *Clayton*, 7 Taunt. 489; S. C., 2 Marsh. 277; *Cayzer* v. *Taylor*, 10 Gray, 274; *Fleet* v. *Hollenkemp*, 13 B. Monr. (Ky.) 219; *Carroll* v. *Staten Island R. R. Co.*, 65 Barb. 32; S. C. affirmed, 58 N. Y. (13 Sick.) 126; 17 Am. Rep. 221.

Whether a party has been negligent is often a mixed question of law and fact. *Dolfinger* v. *Fishback*, 12 Bush (Ky.), 474; *Gagg* v. *Vetter*, 41 Ind. 228; S. C., 13 Am. Rep. 322. And it is laid down as a rule, that when the main fact or facts touching the negligence is sought to be proved by other facts, called circumstantial evidence, the question is always one for the jury. They are to say whether the facts proved justify, by fair reasoning, the finding of the main fact in issue to be true. But when the direct fact in issue is established by undis-

puted evidence, and such fact is decisive of the cause, a question of law is raised, and the court should decide it. The jury have no duty to perform. *Dascomb* v. *Buffalo, etc., R. R. Co.*, 27 Barb. 221; S. C. affirmed, 24 How. 609 *n; Van Lien* v. *Scoville Manuf. Co.*, 4 Daly, 554; S. C., 14 Abb. (N. S.) 74; *Tarwater* v. *Hannibal, etc., R. R. Co.*, 42 Mo. 193; *Catawissa, R. R. Co.* v. *Armstrong*, 52 Penn. St. 282; *Biles* v. *Holmes*, 11 Ired. (N. C.) L. 16. And see on this point, *Glassey* v. *Hestonville, etc., Railway Co.*, 57 Penn. St. 172; *United States* v. *Taylor*, 5 McLean (C. C.), 242; *Toledo, etc., R. R. Co.* v. *Foster*, 43 Ill. 415; *Purvis* v. *Coleman*, 1 Bosw. (N. Y.) 321; S. C. affirmed, 21 N. Y. (7 Smith) 111; *Georgia R. R., etc., Co.* v. *Neely*, 56 Ga. 540.

ARTICLE II.

OF ACTIONABLE NEGLIGENCE.

Section 1. In general. Negligence, as defined at the beginning of the preceding section, when productive of damage to an individual, is actionable. And the *gist* of the action is the *fault* of the defendant, in neglecting to exercise such a reasonable degree of skill, or diligence, or caution, and prudent foresight, as, under the circumstances, might have avoided the injury. *Tally* v. *Ayres*, 3 Sneed (Tenn.), 677. So, it is well settled that, for an injury occasioned by want of due care and skill in doing what one has promised to do, an action may be maintained against him in favor of the party relying on such promise and injured by the breach of it, although there was no consideration for the promise. *Balfe* v. *West*, 22 Eng. Law & Eq. 506; *Benden* v. *Manning*, 2 N. H. 289. Thus, a landlord, whose neglect to use ordinary skill in making repairs on the demised premises causes a personal injury to the tenant, is liable therefor, although his undertaking to make the repairs was gratuitous, and by the tenant's solicitation. *Gill* v. *Middleton*, 105 Mass. 477; S. C., 7 Am. Rep. 548.

It is, however, held that actionable negligence exists only when the party, whose negligence occasions the loss, owe? a duty, arising from contract or otherwise, to the person sustaining such loss (*Kahl* v. *Love*, 37 N. J. Law, 5); or there must be a disregard o some duty or rule of conduct prescribed beforehand, or arising so manifestly from the facts as to leave no doubt of its existence. *Warner* v. *Railroad Company*, 6 Phil. (Penn.) 537. And when the precise act or omission of a defendant is proved, the question whether it is actionable negligence is to be decided by the character of that act or omission, and not by the general character for care and caution which the defendant may

sustain. *King* v. *McDermott*, 2 id. 175; *Tenney* v. *Tuttle*, 1 Allen, 185; *Hays* v. *Millar*, 77 Penn. St. 238; S. C., 18 Am. Rep. 445.

Negligence is not actionable, unless it is the *proximate* cause of the injury complained of. *Lane* v. *Atlantic Works*, 111 Mass. 136. But if a person is injured by the negligence of another, he may recover for the natural and probable consequences of such negligence, although the injury, in the precise form in which it resulted, was not *foreseen* (*Hill* v. *Winsor*, 118 id. 251); and it is no defense for the wrong-doer that others acted in the same way as he did. Id.

The principle upon which owners of property are held liable for acts of negligence in the use thereof is that they are in duty bound to keep their property in such a condition that persons who are lawfully on the premises shall not be injured (see *Schwartz* v. *Gilmore*, 45 Ill. 455; *Sweeny* v. *Old Colony, etc., R. R. Co.*, 10 Allen, 368; *Indermaur* v. *Dawes*, L. R., 1 C. P. 274; L. R., 2 C. P. 311); but this principle does not extend to those who are on the premises of others without right, or without permission. *Baker* v. *Byrne*, 58 Barb. 438. Thus, a laborer, employed in loading ice on board a vessel from the wharf, after finishing his work, went on board the vessel for the gratification of his curiosity, and there fell down an open hatchway and broke his leg, and it was held that he was a mere intruder, and that the owners of the vessel were not liable for the injury. *Severy* v. *Nickerson*, 120 Mass. 306; S. C., 21 Am. Rep. 514. See, also, *Pierce* v. *Whitcomb*, 48 Vt. 127; S. C., 21 Am. Rep. 120. It has, however, been held, that the owner of dangerous machinery who leaves it in an open place, though on his own land, where he has reason to believe that *young children* will be attracted to play with it and be injured, is bound to use reasonable care to protect such children, although technically trespassers, from the danger to which they are thus exposed. *Keffe* v. *Milwaukee, etc., Railway Co.*, 21 Minn. 207; S. C., 18 Am. Rep. 393; *Mullaney* v. *Spence*, 15 Abb. (N. S.) 319. See, also, *Birge* v. *Gardner*, 19 Conn. 507; *Railroad Company* v. *Stout*, 17 Wall. 657. So, while it is true, in general, that where no duty is owed, no liability arises, this rule is held to vary with circumstances; and where, therefore, an owner has reason to apprehend danger from the peculiar situation of his property and its openness to accident, the question of duty then becomes one for a jury, to be determined upon all its facts of the probability of danger, and the grossness of the act of imputed negligence. *Hydraulic Works Co.* v. *Orr*, 83 Penn. St. 332.

§ 2. **Animals.** See *ante*, Vol. 1, 308–318, as to the liability of the owner of animals for negligence with respect to them. By the com-

mon law of England and America, dogs, horses, and all animals which are domestic in their nature, are placed on the same ground, and any person may keep any of them for his use, his pleasure or his protection, or for any lawful purpose that his tastes or inclinations may dictate. Such keeping is perfectly lawful until some vicious propensity is developed and brought to the knowledge of the owner; but after such development and such knowledge the owner is liable for all the injuries which the animal may perpetrate in obedience to such propensity. See Id.; *Van Leuven* v. *Lyke*, 1 N. Y. (1 Comst.) 515. Such animal is then placed by the law on the same footing with a ferocious wild beast, so far as proving the *scienter* is concerned in an action for an injury which it perpetrates, and he must, at his own peril, keep it safe; for if it escape and do an injury, the owner is liable, no matter what diligence he may have used to confine it. The negligence consists in keeping the animal after notice (*Muller* v. *McKesson*, 10 Hun [N. Y.], 44); and the fact that the injury is the first inflicted by the animal does not excuse the owner from liability. *Rider* v. *White*, 65 N. Y. (20 Sick.) 54; 22 Am. Rep. 600. See *Keightlinger* v. *Egan*, 65 Ill. 235; S. C. affirmed, 75 id. 141.

The defendant, knowing the ferocious disposition of his dog, and that it had been accustomed to bite persons, and in particular that, when left guarding his team in a village street, it had on one occasion attacked a passer-by, afterward left it, unsecured and unmuzzled, in or near his sleigh near a village sidewalk. A child of seven years, passing on the sidewalk, came to the sleigh and meddled with a whip lying therein and was thereupon thrown down and bitten by the dog. Under this state of facts it was held that the defendant was liable for the injury, and that the child's act in meddling with the whip was no defense. *Meibus* v. *Dodge*, 38 Wis. 300; S. C., 20 Am. Rep. 6.

A person injured, while in the exercise of due care, by a cow, driven at the time by one who was not in the exercise of due care and knew that the cow was vicious, is entitled to recover for the injury against the driver of the cow. *Hewes* v. *McNamara*, 106 Mass. 281. And see *Cockerham* v. *Nixon*, 11 Ired. (N. C.) 269; *Hudson* v. *Roberts*, 6 Exch. 699. So, the owner of a ram, knowing of its propensity to butt persons, is bound so to secure it as to keep it under safe restraint. *Oakes* v. *Spaulding*, 40 Vt. 347.

It is held that the doctrine of *scienter* ought not to be extended to a contract to take reasonable care. Thus, the defendant, an agistor of cattle, placed the plaintiff's horse in a field with a number of heifers, knowing that a bull, kept on adjoining land, had several times been found in the field and that there was no sufficient fence to keep it out.

He did not, however, know that the bull was of a mischievous disposition. The horse was gored by the bull and killed, and in an action against the defendant for breach of contract to take reasonable care, the jury found for the plaintiff; and it was held that the fact that the defendant had no knowledge of the mischievous disposition of the particular bull was no ground for disturbing the verdict, as such knowledge was not essential to his liability under his contract as an agister to take reasonable care of the plaintiff's horse. *Smith* v. *Cook*, L. R., 1 Q. B. Div. 79; S. C., 15 Eng. R. 194. And see *Sargent* v. *Slack*, 47 Vt. 674; S. C., 19 Am. Rep. 136.

In an action to recover for the bite of a dog, the common-law rule requiring averment and proof of *scienter* is abrogated by statute in Ohio (see *Gries* v. *Zeck*, 24 Ohio St. 329), and in such case, reasonable expenses for medical care, although not actually paid, may be included in the jury's estimate of compensatory damages. Id. A special statute in Vermont dispenses with proof of *scienter*, as to rams, between the first of August and first of December. See *Town* v. *Lamphire*, 37 Vt. 52. And in Delaware, a dog that kills, wounds or worries sheep may be killed by any person with impunity. *Milman* v. *Shockley*, 1 Houst. (Del.) 444.

It is the legal duty of every person having charge of a horse in city or country, to apportion the care with which he handles him to the danger to be apprehended from a failure to keep him constantly under control. Whart. on Neg., § 47; *Dolfinger* v. *Fishback*, 12 Bush (Ky.), 475.

§ 3. **Attorneys.** The general rules of law as to the liability of attorneys for negligence have been stated under a preceding title. See *ante*, tit. *Attorneys*, Vol. 1, pp. 445, 459. In England, *counsel* are not responsible to their clients for negligence. *Swinfen* v. *Lord Chelmsford*, 1 Fost. & F. 619; S. C. affirmed, 5 H. & N. 890. But an action may be maintained against an *attorney* if he has been guilty of gross negligence. *Purves* v. *Landell*, 12 Cl. & F. 91. In the conduct of causes an attorney or solicitor is liable, generally, for the consequences of ignorance or non-observance of the rules of practice of the courts, for the want of care in the preparation of the causes for trial, or of attendance thereon with his witnesses, and for the mismanagement of so much of the conduct of a cause as is usually and ordinarily allotted to his department of the profession. Whilst, on the other hand, he is not answerable for error in judgment upon points of new occurrence or of nice or doubtful construction, or of such as are usually intrusted to men in the higher branch of the profession of the law. Tindal, C. J., in *Godefroy* v. *Dalton*, 6 Bing. 468. And

see *Hawkins* v. *Harwood*, 4 Exch. 503; *Hunter* v. *Caldwell*, 10 Ad. & El. (N. S.) 69; *Stokes* v. *Trumper*, 2 Kay & J. 232; *Cox* v. *Leech*, 1 C. B. (N. S.) 617; *Hart* v. *Frame*, 6 Cl. & F. 193; *Crosbie* v. *Murphy*, 8 Ir. C. L. R. 301. Nor is an attorney liable to an action for negligence at the suit of one between whom and himself the relation of attorney and client does not exist, for giving in answer to a casual inquiry erroneous information as to the contents of a deed. *Fish* v. *Kelly*, 17 C. B. (N. S.) 194. Nor will a bill in equity lie against a solicitor for negligence in investigating a title. *British Mutual Investment Co.* v. *Cobbold*, L. R., 19 Eq. 627; 13 Eng. Rep. 556.

In this country the liability of an attorney is not limited to his *gross* negligence (See *ante*, Vol. 1, 459); but he is liable for the want of such skill, prudence and diligence as lawyers of ordinary skill and capacity commonly possess and exercise. Shearm. & Redf. on Neg., § 212; *Gambert* v. *Hart*, 44 Cal. 542. And where an attorney at law employs another person to prosecute a claim placed in his hands for collection, he is liable to his client for the negligence of the person so employed by him, and the fact that such person is himself a competent lawyer does not relieve the attorney employing him from liability to his client on account of such negligence. *Walker* v. *Stevens*, 79 Ill. 193. See *Wickersham* v. *Lee*, No. 1, 83 Penn. St. 416.

Where a judgment is obtained against a party upon pleadings which are radically defective, and he desires to appeal, and procures bondsmen, but his attorney neglects to do so until the time for appeal expires, the attorney is guilty of *gross* negligence, and is liable for the loss sustained by the client. *Drais* v. *Hogan*, 50 Cal. 121.

But an attorney cannot be charged with negligence, where he accepts as a correct exposition of the law a decision of the supreme court of his State upon the question of the liability of stockholders of corporations of the State, in advance of any decision thereon of the supreme court of the United States. *Marsh* v. *Whitmore*, 21 Wall. 178.

And an attorney incurs no liability to his client in damages for neglect of his professional duty, where the negligence complained of, in its legal effect, works no injury to his client. *Harter* v. *Morris*, 18 Ohio St. 492.

In an action for negligence against an attorney, the burden is generally upon the plaintiff, to prove the negligent act, or at least to state and prove circumstances from which negligence is implied by necessary legal inference (*Purves* v. *Landell*, 12 Cl. & F. 91); but circumstances may shift this burden to the opposite party. Thus, if an attorney is retained to defend a cause, and does nothing, he is bound to show, if

he can, in justification of his conduct, that there was no defense to the action. *Godefroy* v. *Jay*, 7 Bing. 413. So, if in the conduct of a cause, diligence would have been ineffectual, the defendant must prove it. *Bourne* v. *Diggles*, 2 Chit. 311. And see Vol. 1, 466.

§ 4. **Bankers and collectors.** See, generally, as to the liability of banks and bankers, *ante*, Vol. 1, pp. 498–520. Where a national bank takes bonds, etc., on deposit for safe-keeping, without compensation, the bank is a merely voluntary bailee, and will be held liable only for *gross* negligence. *First Nat. Bank of Carlisle* v. *Graham*, 79 Penn. St. 106; S. C., 21 Am. Rep. 49; *DeHaven* v. *Kensington Nat. Bank*, 81 Penn. St. 95. In the case first cited it is held that the mere voluntary act of the cashier of a bank, in receiving securities for safe-keeping, will not render the bank liable for their loss, but if the deposit is known to the directors and acquiesced in, the bank will be liable. The power of a national bank to become a bailee of property either gratuitously or for hire has, however, been questioned (see *First Nat. Bank of Lyons* v. *Ocean Nat. Bank*, 60 N. Y. [15 Sick.] 278; S. C., 19 Am. Rep. 181; *Third Nat. Bank* v. *Boyd*, 44 Md. 47; S. C., 19 Am. Rep. 192, *n*; 22 Am. Rep. 35); and it is held by the supreme court of Vermont that the taking of special deposits, to keep merely for the accommodation of the depositor, is not within the authorized business of national banks, and that the cashiers of such banks have no power to bind them on any express contract accompanying, or any implied contract arising out of such taking. *Wiley* v. *First Nat. Bank of Brattleboro*, 47 Vt. 546; S. C., 19 Am. Rep. 122.

It is the duty of bank directors to use ordinary diligence in acquiring a knowledge of the business of the bank, and they cannot be heard to say that they were not apprised of facts the existence of which is shown by the books, accounts, and correspondence of the bank. They should control the subordinate officers of the bank in all important transactions, and have accordingly been held liable for an abstraction and sale by the latter of a special deposit. *United Society of Shakers* v. *Underwood*, 9 Bush (Ky.), 609; S. C., 15 Am. Rep. 731.

Where a bank, as a collection agency, receives a note for the purposes of collection, its position is that of an independent contractor, and the instruments employed by such bank in the business contemplated are its agents, and not the sub-agents of the owner of the note. And it makes no difference that such collection agency is composed of individuals, instead of being an incorporation. *Hoover* v. *Wise*, 1 Otto (U. S.), 308. See, also, *Mygrault* v. *Pacific Bank*, 47 N. Y. (2 Sick.) 570; S. C., 7 Am. Rep. 489.

By receiving a draft for collection, a bank becomes the agent of the

owner, and, in the discharge of its obligations as such, it is bound to present the same for acceptance without unreasonable delay, and to present the same for payment at its maturity; and, if not accepted, or not paid when presented, it must take such steps, by protest and notice, as are necessary to charge the drawer and indorser. Upon failure to discharge this duty, the receiving bank becomes liable as for negligence, for any damages resulting from the default. *Woolen* v. *New York and Erie Bank*, 12 Blatchf. (C. C.) 359. And see *Bank of Delaware County* v. *Broomhall*, 38 Penn. St. 135. On the other hand, a bank receiving for collection a check payable at a subsequent date, and presenting the same for payment upon the day named without allowing days of grace, is liable to an action by the owner of the check for its negligence in making demand. *Ivory* v. *Bank of the State*, 36 Mo. 475.

§ 5. **Bridges.** See Vol. 1, pp. 732, 733, and see also, *ante*, 595, tit. *Municipal Corporations.* The owner of a bridge franchise is bound to exercise only such care and diligence in the construction of the bridge, and keeping it in proper order, as a prudent man would, in view of the object and purpose for which it is erected and used. *Tift* v. *Towns*, 53 Ga. 47.

In an action against a municipal corporation for damages, resulting from the giving way of a bridge in consequence of *latent* defects, it appeared that the duty to repair was imposed upon the corporation by statute, and it was held that as the latent defect causing the injury could have been detected by proper and careful examination, by skilled persons employed by the authorities, the corporation was liable. *Rapho* v. *Moore*, 68 Penn. St. 404; S. C., 8 Am. Rep. 202. And it is held that the absence of any guards or railing at the side of a bridge forming part of a highway, is a fact from which the jury may find that the bridge was defective, within the meaning of the statute rendering towns liable for injuries resulting from defective highways. *Houfe* v. *Town of Fulton*, 29 Wis. 296; S. C., 9 Am. Rep. 568; *Woodman* v. *Nottingham*, 49 N. H. 387; S. C., 6 Am. Rep. 526. But a town is not liable in damages to one who, while stopping in the highway for the purpose of conversation, leans against a defective railing and is injured by reason of its insufficiency. *Stickney* v. *City of Salem*, 3 Allen, 374. See *Lay* v. *Midland Railway Co.*, 34 L. T. (N. S.) 30.

The plaintiff was driving over a defective bridge, and without his fault the horse broke through the bridge and fell. Immediately thereupon the plaintiff undertook to extricate the horse, and while so doing was injured by a blow from the horse's head, and it was held that the defect in the bridge was the proximate cause of the injury, and

that the town was liable therefor. *Page* v. *Bucksport*, 64 Me. 54; S. C., 18 Am. Rep. 239.

§ 6. **Canals.** See *ante*, Vol. 1, 738, 739.

§ 7. **Carriers of passengers.** Carriers of passengers are not bound at the common law to insure the absolule safety of their passengers, but they are required to exercise the strictest care consistent with the reasonable performance of their contract of transportation. And to render them liable for any injury to a passenger while under their charge, it is enough if it was caused solely by any negligence on their part, however slight, if, by the exercise of the strictest care and precaution, reasonably within their power, the injury would not have been sustained. See *ante*, Vol. 2, pp. 63–98, and cases cited.

The gravamen of the action in such case is the breach of the duty imposed by law upon the carrier, to carry safely, so far as human skill and foresight can go, the persons it undertakes to carry. This duty exists independently of contract, and although there is no contract in a legal sense between the parties. Whether there is a contract to carry, or the service undertaken is gratuitous, an action lies against the carrier for a negligent injury to a passenger. *Carroll* v. *Staten Island R. R. Co.*, 65 Barb. 32; S. C. affirmed, 58 N. Y. (13 Sick.) 126; S. C., 17 Am. Rep. 221. See Vol. 2, 85.

So, the liability of carriers depends not upon the physical ability of the passengers, but upon their own conduct. And where a stage coach was so carelessly driven by a drunken driver that he capsized the coach and greatly injured a female passenger, causing her to miscarry, the carrier was held liable for all the immediate results, and he was not permitted to complain that such passenger was not in a condition to have a stage upset. *Sawyer* v. *Dulany*, 30 Tex. 479. And a person may recover of a carrier for an injury done to his person, although not without fault himself, if the mischief was the result of gross negligence on the part of the carrier, and could have been avoided by the exercise of ordinary care. *Ante*, Vol. 2, 75. Thus, a passenger who insisted on riding on the outside of a coach, though requested by the driver to take his seat inside, was held entitled to recover for injuries caused by the negligence of the driver, the position of the plaintiff not having contributed to the accident. *Keith* v. *Pinkham*, 43 Me. 501.

Where steam conveyances are used by carriers the care must increase in proportion to the risk. See *ante*, Vol. 2, 64. It is the duty of a railroad company to use due care, not only in conveying its passengers upon the journey, but also in providing for their accommodation while they are waiting for its trains, and it is held liable for the consequences of a neglect to properly direct passengers respecting the

mode of entering its cars. *Allender* v. *C. R. I. & P. R. Co.*, 43 Iowa, 276. Whether or not it is the duty of a railway company's employees to assist a passenger in getting upon a car must be determined by the circumstances of each particular case, and, therefore, the question may be left to the jury. Id.

On the part of a person about to take passage on a railway train, it is his duty to inform himself when, where and how he can go or stop, according to the regulations of the railway company, and if he make a mistake, not induced by the company, against which ordinary diligence would have protected him, he has no remedy against the company for the consequences. *Ohio, etc., Railway Co.* v. *Applewhite*, 52 Ind. 540. And see Vol. 2, 67. But it is the duty of the company to use the utmost care and diligence in providing for the passenger a safe and convenient way and manner of access to its trains, and in preventing the interposition of any obstacle which would unreasonably impede him or expose him to harm while proceeding to take his seat in the cars, in order to prevent those injuries which human care and foresight can guard against. *Warren* v. *Fitchburg R. R. Co.*, 8 Allen, 227. And see *Allender* v. *C. R. I. & P. R. Co.*, 37 Iowa, 269; S. C. affirmed, 43 id. 276. See *post*, 684, § 17. And see tit. *Railroads.*

§ 8. **Clerks and recording officers.** Clerks of courts, registers of deeds, and other like ministerial officers are, independently of statute, liable in damages to any one who sustains a special injury by their omission to perform, or by their negligent performance of a duty imposed upon them. See *Morange* v. *Mix*, 44 N. Y. (4 Hand) 315; *Kimball* v. *Connolly*, 33 How. (N. Y.) 247; S. C., 2 Abb. Ct. App. 504; 3 Keyes, 57; *Bevins* v. *Ramsey*, 15 How. (U. S.) 179. And such officers are likewise liable for the default or negligence of their deputies within the ordinary course of their business. *Welddes* v. *Edsell*, 2 McLean (C. C.), 366.

The clerk of a court has been held liable for neglecting to enter a cause on the docket, the plaintiff in the action having been thereby damaged (*Brown* v. *Lester*, 13 Sm. & M. [Miss.] 392); so, he is liable to a person damaged by his failure to require security for costs in a proper case on issuing a writ (*Wright* v. *Wheeler*, 8 Ired. [N. C.] L. 184); or for negligently accepting a bond with insufficient sureties, it being his duty to inquire into their sufficiency (*McNutt* v. *Livingston*, 7 Sm. & M. [Miss.] 641); or for refusing or neglecting to issue a writ in a proper case. *Anderson* v. *Johett*, 14 La. Ann. 614. And he incurs the same liability for negligent certificates. *Work* v. *Hoofnagle*, 1 Yeates (Penn.), 506; *Williams* v. *Hart*, 17 Ala. 102; *Barnes* v. *Smith*, 3 Humph. (Tenn.) 82. But he is not liable for an omission

to do an act which is not required of him by law. *Robinson* v. *Gell*, 12 C. B. 191. See, also, *State* v. *Ruland*, 12 Mo. 264.

§ 9. **Death.** As to this branch of the subject, see *ante*, tit. *Death*, Vol. 2.

At common law, no right of action accrued to any one for personal injuries resulting in instant death, but if there was an appreciable interval of suffering a right of action did accrue to the person injured, and that right of action is made to survive to his personal representative by statute in Kentucky. *Hansford* v. *Payne & Co.*, 11 Bush (Ky.), 380.

In order to maintain an action under the Illinois statute for wrongfully causing the death of a human being, there must be a wrongful act, neglect or default of the defendant, causing the death of the intestate under such circumstances as would entitle him to maintain an action if death had not ensued, and he must have left a widow or next of kin. Where these are shown, the plaintiff is entitled to nominal damages at least. *Quincy Coal Co.* v. *Hood*, 77 Ill. 68.

In an action on the case, under the Colorado statute, for injuries occasioned by negligence and resulting in the death of the party injured, the existence of any of the descendants or kin named in the statute is sufficient to maintain the action. *Kansas Pacific R. R. Co.* v. *Miller*, 2 Col. T. 442.

The rule that personal actions die with the persons is peculiar to the common law, traceable to the feudal system and its forfeitures, and does not obtain in admiralty. And it is held that a husband can recover by a proceeding *in rem* against the vessel which caused the death of his wife, for the injury suffered by him thereby. *The Sea Gull*, Chase's Dec. 145. So, the widow and son of an employee, killed on a steamboat by the negligence of an engineer, have suffered an injury for which they have a remedy against the owners of the vessel. *The Highland Light*, id. 150. See *ante*, 390, tit. *Master and Servant.*

§ 10. **Driving and riding.** It is the general rule that one who fails to exercise ordinary care in riding or driving is liable for all damages thereby occasioned. *Strohl* v. *Levan*, 39 Penn. St. 177; *Bishop* v. *Ely*, 9 Johns. 294; *Barnes* v. *Hurd*, 11 Mass. 57; *Tucker* v. *Henniker*, 41 N. H. 317; *Foster* v. *Goddard*, 40 Me. 64. And it is no defense to an action to recover damages for an injury received from the running of the defendant's horse against the plaintiff, on the highway, that the plaintiff was in a use of the highway not justified by law, provided no negligence, or want of ordinary care on his part, contributed to produce the injury. *Bigelow* v. *Reed*, 51 id. 325. And see *Davies* v. *Mann*, 10 Mees. & W. 545.

One who undertakes to drive a carriage in a crowded street must exercise a diligence proportionate to the dangerous nature of that employment. *Garmon* v. *Bangor*, 38 Me. 443; *Williams* v. *Richards*, 3 Carr. & K. 81. And a driver, who sees a child lacking discretion in the street, should exert more care to avoid doing an injury, than he would use for the safety of a person whose presumed age and experience would prompt him to take steps necessary for his own security. *Vaughn* v. *Scade*, 30 Mo. 600; *Edsall* v *Vandemark*, 39 Barb. 589. So, persons who are driving over a crossing for foot-passengers should drive slowly, cautiously, and carefully. *Cotton* v. *Wood*, 8 C. B. (N. S., 571. And there can be no doubt that driving in a public street at the rate of a mile in three minutes and ten seconds, when the law limits driving to a mile in eleven minutes, is amply sufficient to charge the driver with the consequences that follow from such driving. *Moody* v. *Osgood*, 60 Barb. 644; S. C. affirmed, 54 N. Y. (9 Sick.) 48

It is an instance of culpable negligence to whip violently, while close behind another traveler, a horse which has already shown itself restive and vicious (*Center* v. *Finney*, 17 Barb. 94; S. C. affirmed, 2 Seld. Notes, 44); or to ride or drive at such a rapid rate of speed as will render it impossible to check the horse in time to avoid obstacles which may reasonably be anticipated on the way, or to turn it aside upon meeting or passing other travelers who are themselves acting prudently (*Payne* v. *Smith*, 4 Dana [Ky.], 497); or to put a spur into a horse when close by any person (*North* v. *Smith*, 10 C. B. [N. S.] 572); or to permit a horse and vehicle to go unattended on the highway. *Welling* v. *Judge*, 40 Barb. 193; *Tenney* v. *Tuttle*, 1 Allen, 185; *Park* v. *O'Brien*, 23 Conn. 339. And reckless and noisy driving, which so frightens a horse on or near the highway that he runs away, to the injury of the plaintiff's property, is actionable negligence though no collision has occurred. *Howe* v. *Young*, 16 Ind. 312; *Burnham* v. *Butler*, 31 N. Y. (4 Tiff.) 480. So, if the owner of a horse has notice that his horse when at large is in the habit of running and kicking upon the sidewalk, it is such negligence for him to turn him loose in the streets of a city as will render him liable for any injury done to persons or property by such horse. *Dickson* v. *McCoy*, 39 N. Y. (12 Tiff.) 400.

A person is responsible for an accident which results from his prior negligence. *Kennedy* v. *Way*, Bright. 168.

Where a horse, not properly secured, is frightened and runs away, the neglect of the owner to guard against such an accident renders him liable for the consequences, as well as the person causing the fright.

McCahill v. *Kipp*, 2 E. D. Smith (N. Y.), 413. And from the fact that horses got loose and ran away, negligence in fastening them may be reasonably inferred. *Strup* v. *Edens*, 22 Wis. 432. See, also, *Hummell* v. *Weater*, Bright. (Penn.) 133. That is not an inevitable accident which in any way results from the acts of the defendant or his servants. *Goldey* v. *Pennsylvania R. R. Co.*, 30 Penn. St. 242.

But if a horse runs away without the fault of the driver, he is not answerable for the injury thereby occasioned. *Kennedy* v. *Way*, Bright. (Penn.) 186; *Holmes* v. *Mather*, L. R., 10 Exch. 261; S. C., 16 Eng. R. 384, note; *Sullivan* v. *Scripture*, 3 Allen, 564. Nor is the owner of a horse liable for injuries done by it purely from viciousness, while being driven by him or his servant, unless it appears that he had notice of its vicious disposition. *Hammack* v. *White*, 11 C. B. (N. S.) 588.

The fact that the driver of a horse drives him or stops him within fifty feet of a railroad crossing, and that the horse, frightened by the noise of the train, runs away and injures a person, does not itself show as matter of law want of due care on the part of the driver. *Herrick* v. *Sullivan*, 120 Mass. 576.

If an accident is caused by a defective vehicle or harness, this is negligence in the owner, if the defect was known or ought to have been known by him. Thus, a master is held liable for an accident in consequence of the chain-stay of a cart breaking, when the horse, being frightened, ran away, causing damage, for he is guilty of negligence in not having good tackle. *Welsh* v. *Lawrence*, 2 Chit. 262. See *Doyle* v. *Wragg*, I Fost. & F. 7. So, if a master employs a known drunkard as a driver through whose negligence while intoxicated an injury is done to another, the master is liable. *Sawyer* v. *Sauer*, 10 Kans. 466.

A person who leaves a heavy mass of timber in the streets of a city unguarded is responsible to another person who is injured by its being blown down by the wind. *Thomas* v. *Hook*, 4 Phila. 119.

A traveler having before him the whole road free from obstructions, and having no notice of any vehicle behind him in season to stop or change his course, is at liberty to occupy any part of the road that he pleases. *Foster* v. *Goddard*, 40 Me. 64; *Daniels* v. *Clegg*, 28 Mich. 32. See, also, *Brooks* v. *Hart*, 14 N. H. 307. But it is a universal custom in this country for travelers to take the right-hand of the road when meeting, if practicable, and this rule is enforced by statute in many of the States so far as it respects travelers in vehicles or on horseback. The statute usually prescribes that travelers shall pass to the right of the "center of the road;" and this is construed to mean the

center of the traveled or worked part of the road. See *Simmonson* v. *Stellenmerf*, 1 Edm. (N. Y.) 194; *Kennard* v. *Burton*, 25 Me. 39; *Smith* v. *Dygert*, 12 Barb. 613; *Jaquith* v. *Richardson*, 8 Metc. 213. A mail stage coach is protected by act of congress from obstruction, but is subject in all other respects to the laws of the road. *Bolton* v. *Colder*, 1 Watts (Penn.), 360. But the "law of the road," as it is commonly termed, does not apply to buildings that are being moved through a public highway. *Graves* v. *Shattuck*, 35 N. H. 257. And a person on foot or on horseback cannot compel a teamster, who has a heavy draught, to leave the beaten part of the road, if there is sufficient room to pass; and this rule applies where a person on horseback meets a buggy carrying three persons drawn by a single horse. *Beach* v. *Parmeter*, 23 Penn. St. 196. And see *Grier* v. *Sampson*, 27 id. 183. Where a public way is impassable, and where the act is done as the only means of extricating a team from a mudhole or bog therein, the pulling down of a fence at the side of the way, and passing over the adjoining land, is a necessary and justifiable act. *Hedgepeth* v. *Robertson*, 18 Tex. 858. And see *Kent* v. *Judkins*, 53 Me. 160. The law of the road does not apply to one driver seeking to pass another on the same road (*Bolton* v. *Colder*, 1 Watts, 360; *Avegno* v. *Hart*, 25 La. Ann. 235; 13 Am. Rep. 133); nor has it any application to the meeting of vehicles on a railway track with vehicles of a different kind (*Hegan* v. *Eighth Avenue Railway Co.*, 15 N. Y. [1 Smith] 380); nor in favor of persons crossing or turning into the road. *Lovejoy* v. *Dolan*, 10 Cush. 495.

When two persons, each without any better right than the other, strive to occupy the same place in the public highway, he is in the wrong who first uses force. *Goodwin* v. *Avery*, 26 Conn. 585.

Highways may properly be used for other purposes than the accommodation of the public travel, provided such use be not inconsistent with the reasonably free passage of the public over them. Thus, the streets of a town may be used for the temporary deposit of goods in their transit to the storehouse, or for wharfage, regard being paid to their evident object and purpose. *Haight* v. *Keokuk*, 4 Iowa, 199. And it is held that to leave a horse fastened only by a strap and weight while the wagon is backed up to the sidewalk to be loaded, although the team thereby extends half across the highway and is liable to be hit by a runaway, is not, as a matter of law, negligence (*Greenwood* v. *Callahan*, 111 Mass. 298); and the owner of the team may maintain an action against one who injures the horse by negligently driving another wagon against it, when by exercising more care he might have avoided doing so. Id.; *Steele* v. *Barkhardt*, 104 Mass. 59; S. C., 6 Am. Rep.

191. So, the fact that a driver is on the wrong side of the road will not excuse another for negligently driving into him. *Spofford* v. *Harlow*, 3 Allen, 176; *Clay* v. *Wood*, 5 Esp. 44.

Persons driving cattle through the streets of a city are bound to use the utmost care and diligence to avoid injuries to people who are passing through the street. Their liability is like that of a common carrier. *Ficken* v. *Jones*, 28 Cal. 618.

In England, foot passengers take the right-hand when meeting, but an opposite rule applies to horses and vehicles, which always take the left of the road. And the rule applies to saddled horses as well as carriages. *Turley* v. *Thomas*, 8 Carr. & P. 103. The mere fact of a man's driving on the wrong side of the road is no evidence of negligence in an action against him for running over a person who was crossing the road on foot. *Lloyd* v. *Ogleby*, 5 C. B. (N. S.) 667. It is as much the duty of persons crossing a street or a road to look out for passing vehicles, as it is for the drivers of those vehicles to be vigilant in not running against persons crossing. *Cotton* v. *Wood*, 8 C. B. (N. S.) 568. See *post*, tit. *Ways*.

§ 11. **Fences.** See *ante*, Vol. 3, tit. *Fences*. And see post, 684, § 17.

§ 12. **Fire.** One who designedly sets fire to any thing upon his own premises must use ordinary care to avoid injury thereby to the property of another. *Filliter* v. *Phippard*, 11 Q. B. 347; *Dewey* v. *Leonard*, 14 Minn. 153. And it has been held that a man who negligently sets fire on his own land, and keeps it negligently, is liable to an action at common law for any injury done by the spreading or communication of the fire directly from his own land to the property of another, whether through the air or along the ground, and whether he might or might not have reasonably anticipated the particular manner and direction in which it is actually communicated. *Higgins* v. *Dewey*, 107 Mass. 494; S. C., 9 Am. Rep. 63. See, also, *Fahn* v. *Reichart*, 8 Wis. 255; *Webb* v. *Rome, etc., Railroad Co.*, 49 N. Y. (4 Sick.) 420; S. C., 10 Am. Rep. 389; *Averitt* v. *Murrell*, 4 Jones (N. C.), 323; *Cleland* v. *Thornton*, 43 Cal. 437. So, if a party makes a fire for a necessary purpose, upon or near the grounds of another, but negligently *leaves it*, with combustible material about it, and the fire spreads and destroys adjacent property, the party building the fire is liable for the damages thereby occasioned. Id. See *Culkins* v. *Barger*, 44 Barb. 424.

The burning of a fallow and of superincumbent combustible matter on the surface is of frequent necessity in husbandry, and is a lawful act, unless the fire be set at an improper time or be carelessly managed.

Miller v. *Martin*, 16 Mo. 508; *Hanlon* v. *Ingram*, 3 Iowa, 81; *Hewey* v. *Nourse*, 54 Me. 256; *Gilson* v. *North Grey, etc.*, 33 Upper Can. Q. B. 128; *Hays' Administrator* v. *Miller*, 6 Hun (N. Y.), 320; S. C. affirmed, 10 id. xiv. Ordinary care must be exercised to avoid the spread of the fire upon the land of others, but the mere fact that the person making a fire did not constantly watch it does not tend to prove negligence. *Calkins* v. *Barger*, 44 Barb. 424. The burden of proof is upon the party complaining to show negligence, of which the fire itself is no evidence. *Bachelder* v. *Heagan*, 18 Me. 32; *Tourtellott* v. *Rosebrook*, 11 Metc. (Mass.) 460; *Hinds* v. *Barton*, 25 N. Y. (11 Smith) 544. But the rule is otherwise when one sets fire on land which does not belong to him, in which case the burden of proof is on the defendant to show that he had good cause for firing the land; and especially is this so, with fire started on prairies, or other wild lands where its progress is likely to be attended with great destruction. *Finley* v. *Langston*, 12 Mo. 120. And see *Armstrong* v. *Cooley*, 5 Gilm. (Ill.) 509.

One who uses a steam engine on his premises is bound to the use of ordinary care in confining sparks, especially if he burns wood. The want of such care is strong evidence of negligence, and where a steam engine was used without putting on a spark-catcher, and the sparks set fire to a neighbor's farm buildings, the person using the engine was held liable for the damage done. *Teall* v. *Barton*, 40 Barb. 137; S. C. affirmed, 25 N. Y. (11 Smith) 137.

It has been held that the negligent burning of a house, and the spreading of the fire to a neighboring house, and the burning thereof, do not give the owner of the last house a cause of action against the owner of the house in which the fire originated; the damage in such case being deemed too remote. *Ryan* v. *New York Central Railroad*, 35 N. Y. (8 Tiff.) 210. So, an engine on a railroad negligently set fire to a house, the fire from the house communicated to another at some distance from it, which was consumed with all its contents, and it was held that the railroad company were not liable for damages for the last building and its contents. *Pennsylvania R. R. Co.* v. *Kerr*, 62 Penn. St. 353; S. C., 1 Am. Rep. 431. See, also, *Macon R. R. Co.* v. *McConnell*, 27 Ga. 481. But this rule is not adopted by the courts in some of the States. Thus, it is held in Illinois, if fire is communicated from a railway locomotive to the house of A., and thence to the house of B., it is not a conclusion of law that the fire sent forth by the locomotive is to be regarded as the remote, and not the proximate cause of the injury to B., but a question of fact, to be determined in each case by the jury under the instructions of the court. *Fent* v. *Toledo, etc.*,

Railway Co., 59 Ill. 349; S. C., 14 Am. Rep. 13. And in a recent case in Kansas, it is held that where two fires are caused by sparks emitted from one of the defendant's engines, and neither of the fires is kindled on the land of the plaintiff, but each is kindled on the land of a differen owner, and these two fires spread, finally uniting, and then pass over the property of several landed proprietors and finally reach the plaintiff's property three and a half to four miles distant from where the fires were first kindled, and there do the damage of which the plaintiff complains, the damage is not too remote to be recovered. *Atchison, etc., R. R. Co.* v. *Stanford*, 12 Kans. 354; S. C., 15 Am. Rep. 362. See, also, *Kellogg* v. *Chicago, etc., Railway Co.*, 26 Wis. 223; S. C., 7 Am. Rep. 69; *Pennsylvania R. R. Co.* v. *Hope*, 80 Penn. St. 373; S. C., 21 Am. Rep. 100; *Perley* v. *Eastern R. R. Co.*, 98 Mass. 414; *Henry* v. *Southern Pacific R. R. Co.*, 50 Cal. 176.

A railroad company, having no express authority to use steam or other power involving the use of fire, is held liable for the escape of fire from its engines, without respect to the question of negligence. *Jones* v. *Festiniog Railway Co.*, L. R., 3 Q. B. 733. And this is so by statute in some of the States in the case of *chartered* railroad companies. See *Stearns* v. *Atlantic, etc., R. R. Co.*, 46 Me. 95; *Hooksett* v. *Concord, etc., R. R. Co.*, 38 N. H. 242; *Ingersoll* v. *Stockbridge, etc., R. R. Co.*, 8 Allen, 438. But in the absence of a statute imposing the liability, a railroad company, authorized by its charter to use steam power, is not liable for injuries unavoidably produced by keeping fire for the purpose of generating steam. *Burlington, etc., R. R. Co.* v. *Westover*, 4 Neb. 268; *Freemantle* v. *London, etc., Railway Co.*, 10 C. B. (N. S.) 89; *Vaughan* v. *Taff Vale Railway Co.*, 5 Hurlst. & N. 679. And where a party seeks to recover on account of injuries caused by fire communicated from its engines, the burden of proof is upon him to show negligence in the company. *Philadelphia, etc., R. R. Co.* v. *Yerger*, 73 Penn. St. 121; *Indianapolis, etc., R. R. Co.* v. *Paramore*, 31 Ind. 143. Negligence on the part of the company will not be presumed from the mere fact of injury. *McCummons* v. *Chicago, etc., Railway Co.*, 33 Iowa, 187. But see *Burke* v. *Louisville, etc., R. R. Co.*, 7 Heisk. (Tenn.) 451; S. C., 19 Am. Rep. 618; *Coale* v. *Hannibal, etc., R. R. Co.*, 60 Mo. 227. Thus, where the injury complained of was caused by the engine's coals being emptied upon the track, and this act was found to be necessary, and to have been carefully done, it was held that the plaintiff could not recover. *McCready* v *South Carolina R. R. Co.*, 2 Strobh. (S. C.) 356. But where coals, negligently dropped from the defendant's locomotive, set fire to the

ties under its track, and from thence spread through the defendant's premises and ran into the plaintiff's woodland adjoining, and burnt and damaged the wood and soil, the plaintiff was held to be entitled to recover for the damages sustained. *Webb* v. *Rome, etc., R. R. Co.*, 3 Lans. (N. Y.) 453; S. C. affirmed, 49 N. Y. (4 Sick.) 420; 10 Am. Rep. 389. See, also, *McCoun* v. *New York Central, etc., R. R. Co.*, 66 Barb. 338. So, the neglect to use a "spark-extinguisher" is held to be *per se* negligence. *Anderson* v. *Cape Fear Steamboat Co.*, 64 N. C. 399. It has likewise been held that a railroad company is bound to keep its track and contiguous land clear of materials likely to be ignited from sparks issuing from its locomotive properly constructed and driven. *Salmon* v. *Delaware, etc., R. R. Co.*, 9 Vroom (N. J.), 5; S. C., 20 Am. Rep. 356; *Troxler* v. *Richmond, etc., R. R. Co.*, 74 N. C. 377. On the other hand, it has been ruled in Illinois, that the owners of lands contiguous to railroads are as much bound to keep their lands free from dry grass and weeds as the railroad company is on its roadway; and that unless it appears that the negligence of the company is greater than that of the land-owner, the latter cannot recover for injuries by fire thus arising. *Illinois Central R. R. Co.* v. *Nunn*, 51 Ill. 78; *Ohio, etc., R. R. Co.* v. *Shanefelt*, 47 id. 497. And that it is not negligence *per se* for a railway company to permit standing grass and weeds to remain on its right of way, see *Kansas Pacific R. R. Co.* v. *Butts*, 7 Kans. 308; *Smith* v. *Hannibal, etc., R. R. Co.*, 37 Mo. 288; *Henry* v. *Southern Pacific R. R. Co.*, 50 Cal. 176; *Pittsburgh, etc., R. R. Co.* v. *Nelson*, 51 Ind. 150. It is held by the supreme court of the United States that whether the destruction of property by fire communicated by a locomotive was the result of negligence on the part of a railroad company, depends upon the facts shown as to whether or not it used such caution and diligence as the circumstances of the case demanded, or prudent men ordinarily exercise, and not upon the usual conduct of other companies in the vicinity. *Grand Trunk R. R. Co.* v. *Richardson*, 1 Otto (U. S.), 454.

§ 13. **Gas companies.** A gas company, engaged in the business of manufacturing gas, and in supplying it to its customers, is bound to exercise a degree of care and skill proportioned to the danger incident to the business. *Pottstown Gas Co.* v. *Murphy*, 39 Penn. St. 257; *Hipkins* v. *Birmingham Gas Co.*, 6 Hurlst. & N. 250. Thus, a gas-light company, in lighting a city, is bound to supply pipes of sufficient strength to stand all lawful uses which may be made of the public streets through which they pass, and is responsible for all damages resulting from the breaking of the pipes in consequence of such use. *Brown* v. *New York Gas Light Co.*, Anth. N. P. (N. Y.) 351. So,

where pipes are broken by any cause and the company is notified and negligently delays repairing them, and damage ensues, the company is responsible. Id.; *Mose* v. *Hastings, etc., Gas Co.*, 4 Fost. & F. 324. See *Holly* v. *Boston Gas Light Co.*, 8 Gray, 123. A gas company is likewise answerable for injury arising from the escape of noxious smells in the process of manufacture and from the percolation of gas and refuse from the works through the ground into adjoining land or water (*Pottstown Gas Co.* v. *Murphy*, 39 Penn. St. 257); and it is no defense, in such case, to show that the injury was aggravated by other causes. *Sherman* v. *Fall River Iron Co.*, 5 Allen, 213; *Brown* v. *Illius*, 27 Conn. 84. So, if there be a defect in the apparatus furnished by a gas company and an injury arises partly from that cause and partly from the negligence of a stranger, the company is, nevertheless, liable. *Burrows* v. *March Gas and Coke Co.*, L. R., 5 Exch. 67; S. C., 1 Eng. Rep. 202; *Schermerhorn* v. *Metropolitan Gas Light Co.*, 5 Daly (N. Y.), 144. But it is otherwise if the injury be the result of mismanagement by a stranger, provided the apparatus is sound. *Flint* v. *Gloucester Gas Light Co.*, 9 Allen, 552.

A gas company is held liable for damages occasioned by the negligence of its servants in any work done by them with a view to the benefit of the company, although such negligent work be performed about property not belonging to the company. Thus, where the defendant (a gas company) being informed that gas was escaping in the cellar of an occupied house, sends its employee to ascertain the location of the leak, and the person so sent, by lighting a match in the cellar, causes an explosion, by which the plaintiff is injured, such employee, although acting for the benefit of the occupants of the house as well as of the defendant, is the agent of the defendant only and the defendant is liable for his negligence. *Lannen* v. *Albany Gas Light Co.*, 46 Barb. 264; S. C. affirmed, 44 N. Y. (5 Hand) 459.

§ 14. **Highways.** In England, a common law obligation to maintain and repair highways, enforceable by indictment, rests upon the parishes. See *Rex* v. *Eastrington*, 5 Ad. & El. 765; *Rex* v. *Liverpool*, 3 East, 86; *Parsons* v. *St. Mathew's, etc., Vestry*, L. R., 3 C. P. 56; *Gibson* v. *Mayor of Preston*, L. R., 5 Q. B. 218. And see *Phillips* v. *Commonwealth*, 44 Penn. St. 197. In this country, the obligation to construct and maintain highways is wholly statutory, and where no such obligation is imposed by statute, no remedy for its violation can be had at the suit of a private party. Thus, it is held that towns in this country do not succeed to the duty of repairing highways in consequence of any special correspondence between their nature, organization and functions, and those of parishes in England;

but, if at all, it must be because by our statutes certain powers are given to, and certain duties imposed upon, towns or rather upon their officers, in regard to roads, and because the making and repairing of roads is, to a considerable extent, accomplished through town organizations. *Morey* v. *Newfane*, 8 Barb. 645. See, also, *Chidsey* v. *Canton*, 17 Conn. 475; *People* v. *Commissioners of Highways*, 7 Wend. 474; *Oliver* v. *City of Worcester*, 102 Mass. 490; S. C., 3 Am. Rep. 485. It has, however, been said in a case in New Hampshire, that by immemorial custom and independently of any statute that has been preserved, the towns in that State have been held liable to keep in repair the highways within their limits, and that for neglect of that duty common law remedies, both of a public and a private character, have existed, and those of a public character at least, put in force from a very early period. *Wheeler* v. *Troy*, 20 N. H. 77. And in a very recent case in that State it is held that the owner of land adjoining a highway may maintain an action at common law against the town to recover damage caused to his land by the fault or negligence of the town in not building and maintaining the road in a reasonably suitable and proper manner. *Gilman* v. *Laconia*, 55 N. H. 130; S. C., 20 Am. Rep. 175.

In the New England States, the general duty of building and keeping highways in repair is imposed by statute upon towns, and they are declared to be liable in damages to any one who suffers injury through their neglect of such duty. See *Stanton* v. *Springfield*, 12 Allen, 566; *Providence* v. *Clapp*, 17 How. (U. S.) 161; *Peck* v. *Ellsworth*, 36 Me. 393. Such is also the law in Wisconsin. See *Kitredge* v. *Milwaukee*, 26 Wis. 46; *Draper* v. *Town of Ironton*, 42 Wis. 696. But in the other States, the duty is usually imposed upon independent public officers, elected for that purpose, or the duty is voluntarily assumed by incorporated cities and villages, as one of their charter obligations. See *ante*, tit. *Municipal Corporations*. In some cases the duty is assumed by private parties as a condition of a grant of a franchise, such as turnpikes, plank-roads, toll-bridges, etc. In such case, the liability to pay tolls is a consideration for the undertaking on the part of the owners of the franchise to furnish a safe road for the use of the traveler, as an equivalent. *Davis* v. *Lamoille County Plank Road Co.*, 27 Vt. 602; *Stanton* v. *Proprietors of Haverhill Bridge*, 47 id. 172, 181; *Townsend* v. *Susquehanna Turnpike Co.*, 6 Johns. 90; *Parnaby* v. *Lancaster Canal Co.*, 11 Ad. & El. 223, 243; *Waterford, etc., Turnpike Co.* v. *People*, 9 Barb. 161. In some of the States, turnpike companies are by statute made liable for all damages happening to travelers from want of repair of their roads. And under such a stat-

ute, a turnpike company becomes an insurer of the safe condition of its road, and is liable for injuries even from latent defects therein. *Yale* v. *Hampden, etc., Turnpike Co.*, 18 Pick. 357. But at common law, the proprietors of turnpikes, plank-roads, etc., are bound to exercise only ordinary care in the maintenance of their highways. *Grigsby* v. *Chappell*, 5 Rich. (S. C.) Law, 443; *Bridge Company* v. *Williams*, 9 Dana (Ky.), 403. So, in general, a municipal corporation is only bound to exercise ordinary care and vigilance in keeping the streets within its limits in a safe condition (*McGinity* v. *Mayor, etc., of New York*, 5 Duer [N. Y.], 674); and negligence must be affirmatively shown. Id.; *Parker* v. *City of Cohoes*, 10 Hun (N. Y.), 531. But where towns are, by statute, made absolutely liable in damages for all injuries occasioned by any want of repair, or by any obstructions or defects in their highways, it is only necessary, in an action to recover for injuries occasioned by the defective condition of a highway, to prove the existence of the defect, and that the injury was occasioned thereby. If there be a defect in the road, however small, which occasions an injury, the party injured using common and ordinary care, the town is liable. *Merrill* v. *Hampden*, 26 Me. 234; *Horton* v. *Ipswich*, 12 Cush. 488. What is a "defect or want of repair" within the meaning of the term as used in such a statute, is a question of fact to be determined bv the jury, under the instructions of the court, upon the circumstances of each particular case. *Hutchinson* v. *Concord*, 41 Vt. 271; *Washburn* v. *Town of Woodstock*, 49 id. 503; *Hixon* v. *Lowell*, 13 Gray, 59; *Howard* v. *Mendon*, 117 Mass. 585; *Winship* v. *Enfield*, 42 N. H. 197; *Draper* v. *Town of Ironton*, 42 Wis. 696. In general, such a state of repair in a road as would free a town from exposure to an indictment and conviction, would protect it also against a claim for damages for an injury sustained by an individual, while traveling thereon. *Merrill* v. *Hampden*, 26 Me. 234.

The duty of towns under the Maine statute, to keep their highways "safe and convenient" is not conditioned upon the performance or nonperformance by the highway surveyor of his duty, under the same statute, to keep the highways "passable." *Rogers* v. *Newport*, 62 Me. 101. And a city or town in Massachusetts is not exempted from liability for a defect in a highway occasioned by misconduct or negligence in the construction or repair of a street railway, notwithstanding the statute making the railway company liable for such negligent or unskillful conduct. *Hawks* v. *Northampton*, 116 Mass. 420.

In New Jersey, township authorities liable to indictment for neglect to keep highways in repair may file a bill in their own name, to restrain

a corporation from rendering such highways impassable. *Easton, etc., R. R. Co.* v. *Greenwich*, 25 N. J. Eq. 565.

In the absence of a statute making the liability absolute, a municipal corporation is liable only for a failure to remedy such defects in a sidewalk as may be detected and remedied by the use of ordinary care and diligence. Thus, mere knowledge on the part of a few private citizens of a latent defect in a sidewalk is not sufficient to charge the city with notice. *Kenyon* v. *Indianapolis*, 1 Wilson (Ind.), 129. And see *Water Company* v. *Ware*, 16 Wall. 566.

In New York it is well settled that, in the case of a village or city where the trustees, or common council, are made commissioners of highways, the corporation is liable for their negligence in not keeping the streets and sidewalks, within the corporation limits, in a condition safe for the use of passengers thereon. Thus, it is the duty of such municipal authorities to see that the sidewalks are kept reasonably clear of ice and snow, and when they permit such an accumulation thereof as to constitute an obstruction to remain an unreasonable length of time, to the danger of travelers, the corporation is chargeable with negligence without proof of actual notice. *Todd* v. *City of Troy*, 61 Barb. 580; S. C. affirmed, 61 N. Y. (16 Sick.) 506. See, also, *Hume* v. *Mayor of New York*, 9 Hun (N. Y.), 674. And see *ante*, tit. *Municipal Corporations*, under which head, the liability of such corporations for negligence in respect to streets and highways is fully discussed.

Towns are not generally obliged to make all the land that is laid out as a highway passable, but they are bound to keep the margins of their highways reasonably safe. And although the town will not be responsible, if a traveler voluntarily diverge from the traveled path, and injury result, yet, if he be forced into the ditch by accident, and injury ensue by reason of an obstruction placed there, the town will be liable. *Willey* v. *Portsmouth*, 35 N. H. 303; *Cassedy* v. *Town of Stockbridge*, 21 Vt. 391; *Foshay* v. *Glenhaven*, 25 Wis. 288; S. C., 3 Am. Rep. 73. So, if a town permits a turn-out to exist from the traveled part of its highway to a private way, over adjoining land, with all the characteristic marks of a highway, it will be bound to keep such part of the turn-out as is within the laid out limits of the highway in suitable repair for the travel usually passing over it. *Stark* v. *Lancaster*, 57 N. H. 88. And in general, whatever portion of the way a traveler, in the exercise of due care, understands to be designed for travel, must be so considered, and the town will be held liable for defects therein. *Saltmarsh* v. *Bow*, 56 id. 428.

Towns are not in general obliged to maintain fences merely to pre-

vent travelers from straying out of the highway. *Sparhawk* v. *City of Salem*, 1 Allen, 30; *Chapman* v. *Cook*, 10 R. I. 304; 14 Am. Rep. 686; *Sykes* v. *Pawlet*, 43 Vt. 446; S. C., 5 Am. Rep. 295. But they are bound to erect fences or railings at places which would otherwise be unsafe or inconvenient for travelers exercising ordinary care. *Collins* v. *Dorchester*, 6 Cush. 396. The law requires highways to be made safe and convenient for travelers, and where in traveling near the edge of the way there is danger of being precipitated down an embankment, or into an excavation, or into water, a railing is necessary to render traveling on the highway *safe*. Without it there would be immediate danger, and for this reason an action is given for the want of a sufficient railing as well as for a defect or want of repair. *Kimball* v. *Bath*, 38 Me. 219; *Norris* v. *Litchfield*, 35 N. H. 271; *Chicago* v. *Gallagher*, 44 Ill. 295; *Hyatt* v. *Rondout*, 44 Barb. 385; *Ward* v. *Town of North Haven*, 43 Conn. 148; *Woods* v. *Groton*, 111 Mass. 357. See *Hey* v. *Philadelphia*, 9 Phil. (Penn.) 166; *Hey* v. *Philadelphia*, 81 Penn. St. 44; 22 Am. Rep. 733. In general, whether a railing or a light at any part of a road is necessary, is a question of fact for the jury. *Leicester* v. *Town of Pittsford*, 6 Vt. 245; *Houfe* v. *Town of Fulton*, 29 Wis. 296; S. C., 9 Am. Rep. 568.

In New York, a highway commissioner negligently left a highway bridge which he had constructed, in a dangerous condition, and it was held that the commissioner having undertaken to build the bridge, was liable for negligence in its construction, to those injured without fault, although sufficient funds had not been put into his hands for the purpose of building. *Rector* v. *Pierce*, 3 N. Y. Sup. Ct. (T. & C.) 416. See, also, *Lament* v. *Haight*, 44 How. 1.

To render a town or city liable for an injury sustained on a highway it must have been sustained by a *traveler* (see *Smith* v. *City of Leavenworth*, 15 Kan. 81), and the defect of the way, either alone or combined with some matter of pure accident for which the traveler was not in fault, must have been the sole cause of the injury. *Hawes* v. *Fox Lake*, 33 Wis. 438; *Baldwin* v. *Greenwoods Turnpike Co.*, 40 Conn. 238; 16 Am. Rep. 33. If the negligence of the traveler contributes, in conjunction with the defect, to produce the injury, he cannot recover any damages he may have sustained therefrom. *Fallon* v. *City of Boston*, 3 Allen, 38; *Farrar* v. *Greene*, 32 Me. 574. But a traveler on a highway is only bound to exercise ordinary care and circumspection, according to the circumstances of the case, to avoid injury from defects in such highway, and he need not show such care as men of great caution would have exercised, in order to entitle himself to

recover for injuries received in consequence of such defects. *Houfe* v. *Town of Fulton*, 29 Wis. 296; S. C., 9 Am. Rep. 568. Foot passengers, and those driving in carriages, have equal rights in the streets of a city, and both are required to exercise that degree of care and prudence which the circumstances of the case demand. *Brooks* v. *Schwerin*, 54 N. Y. (9 Sick.) 343.

Where a driver attempts to pass another on a public road, he does so at his peril. At least, he must be responsible for all damages which he causes to the one whom he attempts to pass, and whose right to the proper use of the road is as great as his, unless the latter is guilty of such recklessness or even gross carelessness as would bring disaster upon himself. *Avegno* v. *Hart*, 25 La. Ann. 235; 13 Am. Rep. 133. See *ante*, 665, § 10. But it is held to be the duty of towns in Vermont, to provide for the safety of travelersiin passing teams going in the same direction, and to construct and keep their highways, at places which naturally invite the attempt to pass, reasonably safe for that purpose. *Mochler* v. *Town of Shaftsbury*, 46 Vt. 580; S. C., 14 Am. Rep. 634.

Nor is the duty confined to cases of absolute necessity on the part of the traveler, but it has been extended to the case of one who attempted to pass a team merely for the purpose of keeping in company with a companion who had driven ahead. Id. And see *Damon* v. *Scituate*, 119 Mass. 66; 20 Am. Rep. 315.

Only the same degree of care to avoid accidents is required of one passing along the street by night as by day, although in the former case this may call into exercise greater caution and watchfulness. *Stier* v. *City of Oskaloosa*, 41 Iowa, 353. The streets and sidewalks are for all conditions of people, and all have the right, in using them, to assume that they are in good condition, and to regulate their conduct upon that assumption. Thus a person may walk or drive in the darkness of the night, relying upon the belief that the corporation has performed its duty, and that the street or the walk is in a safe condition. So, one whose sight is dimmed by age, or a near-sighted person whose range of vision was always imperfect, or one whose sight has been injured by disease, is each entitled to the same rights, and may act upon the same assumption. *Davenport* v. *Ruckman*, 37 N. Y. (10 Tiff.) 568; affirming S. C., 10 Bosw. 20; *Peach* v. *City of Utica*, 10 Hun (N. Y.), 477. Though greater care is, perhaps, required of a person whose sight is defective, than is required of persons of good sight. *Winn* v. *Lowell*, 1 Allen, 177.

To maintain an action for damage sustained from the insufficiency of a road or bridge, it is not enough for the plaintiff to show that the road was out of repair, and that an injury has been sustained, but he

must show *prima facie*, at least, that the injury was occasioned by the defect. *Lester* v. *Town of Pittsford*, 7 Vt. 158. And see *Church* v. *Cherryfield*, 33 Me. 460; *Collins* v. *Dorchester*, 6 Cush. 396; *Sherman* v. *Kortright*, 52 Barb. 267; *Quinlan* v. *City of Utica*, 11 Hun (N. Y.), 217. See *post*, tit. *Ways*.

§ 15. **Notaries public.** A notary public is an officer, known to the law merchant, and, of consequence, to the common law, of which it is a part. And the creation of the office of notary public by statute authorizes the officer to act in the form prescribed by the common law, if no other form is prescribed which can be followed. *Kirksey* v. *Bates*, 7 Port. (Ala.) 529. See *Commercial Bank of Kentucky* v. *Varnum*, 49 N. Y. (4 Sick.) 269. In this country, the chief functions of a notary are, to note and protest bills of exchange, to note and draw up ship protests, and all other protests which are customary according to the usage of merchants. Shearm. & Redf. on Neg., § 423. And see *Parker* v. *Lowrie*, 6 Watts & S. (Penn.) 507; *Williamson* v. *Turner*, 2 Bay (S. C.), 410; *Schneider* v. *Cochrane*, 9 La. Ann. 235. In addition, notaries are generally authorized to administer oaths and affirmations, and to take acknowledgments of deeds and other instruments. See *Bours* v. *Zachariah*, 11 Cal. 281; *Ex parte Mallinkrodt*, 20 Mo. 493; *Crone* v. *Angell*, 14 Mich. 340; *Adams* v. *Wright*, 14 Wis. 408. A notary holds himself out to the world as a person competent to perform the business connected with his office. By accepting the office, and entering upon the discharge of the duties, he contracts with those who employ him that he will perform such duty with integrity, diligence, and skill. *Fogarty* v. *Finlay*, 10 Cal. 239. And, like other ministerial officers, he is liable in damages to any person specially injured by his omission to perform, or by his unskillful performance of a ministerial duty. See *Kinnard* v. *Willmore*, 2 Heisk. (Tenn.) 619; *Hover* v. *Barkhoff*, 44 N. Y. (5 Hand) 113; *Sawyer* v. *Corse*, 17 Gratt. (Va.) 230. So, the statute prescribing the powers and duties of notaries, generally declare their liability to a private action for damages resulting from negligence. See *Fogarty* v. *Finlay*, 10 Cal. 239; 2 N. Y. Rev. Stat. 284, § 48.

In the protesting of bills of exchange, notaries are usually employed by bankers, and it is the settled law in many of the States that a banker who thus employs a competent notary is not liable for the notary's neglect to perform his duty. See *Bowling* v. *Arthur*, 34 Miss. 41; *Jackson* v. *Union Bank*, 6 Harr. & J. (Md.) 146; *East Haddam Bank* v. *Scovill*, 12 Conn. 303; *Stacy* v. *Dane County Bank*, 12 Wis. 629; *Fabens* v. *Mercantile Bank*, 23 Pick. 330; *Baldwin* v. *Bank of Louisiana*, 1 La. Ann. 13. But see *Thompson* v. *Bank of*

South Carolina, 3 Hill (S. C.), 77; *Allen* v. *Merchants' Bank*, 22 Wend. 215; *Ayrault* v. *Pacific Bank*, 47 N. Y. (2 Sick.) 570; S. C., 7 Am. Rep. 489. In the case last cited, a bank having received promissory notes for collection when due, employed a notary to present them and to give notice to the proper parties, and the bank was held liable for any negligence of the notary in omitting to demand payment of the maker, or to give notice of protest to the indorsers. See *ante*, Vol. 1, 516, 517.

In cases of foreign bills of exchange, it is a well-settled rule, that there must be a protest of the bill by a notary public, in all places where such officer is at hand. And it is likewise held that the presentment and demand must be made in person by the same notary who protests the bill; and that it cannot be done by a clerk, nor by any other person as his agent, though he be also a notary. *Sacrider* v. *Brown*, 3 McLean (C. C.), 481; *Chenowith* v. *Chamberlain*, 6 B. Monr. (Ky.) 60; *Donegan* v. *Wood*, 49 Ala. 242; S. C., 20 Am. Rep. 275; *Onondaga Bank* v. *Bates*, 3 Hill (N. Y.), 53; *Commercial Bank* v. *Barksdale*, 36 Mo. 563. The protest is to be evidence of facts stated in it, of which the notary is supposed to have *personal* knowledge, and credit is given to his official statements by the commercial world on the faith of his public and official character. Id.; *Warnick* v. *Crane*, 4 Denio, 460.

In England, it is customary for the clerks of notaries to present bills, whether foreign or inland, for acceptance or payment, the notary afterward noting the presentment and preparing his protest. See Brooke, Office of Notary (3d ed.), 71, 128. And it is held in New York that, in an action against a notary for neglect to make presentment and demand, evidence that it is the common and universal usage at the place where the bill was payable for notaries' clerks to make such presentment and demand is proper and admissible. *Commercial Bank of Kentucky* v. *Varnum*, 49 N. Y. (4 Sick.) 269.

A notary is, in general, liable for a loss occasioned by his negligence in failing to discharge his duty in protesting and delivering or mailing notices of protest as required by law. But in order to fix such liability, the loss must be shown to have been on account of the want of skill or diligence on the part of the notary. He is not liable in a matter in which judicial construction was necessary to enable him to know what was his duty. *Neal* v. *Taylor*, 9 Bush (Ky.), 380. So, a notary, to whom a draft is given for protest, is bound to follow the instructions given him; it is not his duty to determine whether or not the draft should be protested on a certain day. He is not guilty of negligence in proceeding according to the instructions of the bank

giving him the draft to protest, and is not, therefore, liable to any person for any damage resulting from the presentation of the draft on the wrong day. *Commercial Bank of Kentucky* v. *Varnum*, 7 Hun (N. Y.), 236. Nor can a party recover from a notary for having neglected to protest a note legally, when, by his own laches, he has put it out of his power to subrogate the notary to his rights as they existed at the date of protest. *Emmerling* v. *Graham*, 14 La. Ann. 389. And see *Franklin* v. *Smith*, 21 Wend. 624; *Reed* v. *Darlington*, 19 Iowa, 349.

§ 16. **Physicians and surgeons.** In England, before the passage of the Medical Act (Stat. of 21 & 22 Vict., c. 90), a physician could not maintain an action for his fees (*Chorley* v. *Bolcot*, 4 T. R. 317); though it was held that he might recover for professional services on a special contract. *Veitch* v. *Russell*, 3 G. & D. 198; S. C., 3 Q. B. 928; Carr. & M. 362; *Att.-Gen.* v. *Royal College of Physicians*, 1 Johns. & H. 561. He was supposed to render his services from purely philanthropic motives, and he was, accordingly, held liable for his negligence only to the extent to which one is liable who renders a gratuitous service. See *Gibbon* v. *Budd*, 2 Hurlst. & Colt. 92. But a surgeon or apothecary has always been held subject to the usual rules of liability. See *Seare* v. *Prentice*, 8 East, 348; *Slater* v. *Baker*, 2 Wils. 359; *Kanneu* v. *McMullen*, Peake, 59.

No such distinction has ever existed in this country, and physicians of all grades may maintain actions for their fees (*Judah* v. *McNamee*, 3 Blackf. [Ind.] 269; *Alder* v. *Buckley*, 1 Swan [Tenn.], 69); and a physician or surgeon, in the performance of his professional duties, is liable for all injuries resulting from the want of ordinary diligence, care and skill. *Graham* v. *Gantier*, 21 Tex. 111; *McNevins* v. *Lowe*, 40 Ill. 209; *Craig* v. *Chambers*, 17 Ohio St. 253; *Hathorn* v. *Richmond*, 48 Vt. 557; *Hesse* v. *Knippel*, 1 Mich. (N. P.) 109. To render him liable, it is not enough that there has been a less degree of skill than some other medical men might have shown, or a less degree of care than even he himself might have bestowed; nor is it enough that he himself acknowledged some degree of want of care; there must have been a want of competent and ordinary care and skill, and to such a degree as to have led to a bad result. *Rich* v. *Pierpoint*, 3 Fost. & F. 35. And see *Wood* v. *Clapp*, 4 Sneed (Tenn.), 65; *West* v. *Martin*, 31 Mo. 375. Where one holds himself out to the public as a physician and surgeon, the law implies a promise and a duty on his part that he will use reasonable skill and diligence in the treatment, and for the cure of those who may employ him. *Patten* v. *Wiggin*, 51 Me. 594; *Branner* v. *Stormont*, 9 Kans. 51; *Carpenter* v. *Blake*, 50 N. Y. (5

Sick.) 696; *Reynolds* v. *Graves*, 3 Wis. 416. But he does not undertake, at all events, that he will perform a cure, nor does he undertake to use the highest possible degree of skill. *Lanphier* v. *Phipos*, 8 Carr. & P. 475; *Haire* v. *Reese*, 7 Phil. (Penn.) 138. If more than reasonable skill and diligence is expected, it must be expressly stipulated for. *McCandless* v. *Mc Wha*, 22 Penn. St. 261. But in judging of the degree of skill required in any given case, it is held that regard is to be had to the advanced state of the profession at the time. Id.; *Smothers* v. *Hanks*, 34 Iowa, 286; S. C., 11 Am. Rep. 141; *Almond* v. *Nugent*, 34 Iowa, 300; S. C., 11 Am. Rep. 147. The physician is bound to be up to the improvements of the day, for the patient is entitled to the benefit of these increased lights. Id. But he cannot try experiments with his patients to their injury. *Patten* v. *Wiggin*, 51 Me. 594.

It has been said that when the service is rendered gratuitously the physician is only liable for *gross* negligence. *Ritchey* v. *West*, 23 Ill. 385. But a person injured by the negligence of a medical man is entitled to his remedy against him for the injury, although the contract for the services of the medical man was made with a friend of the person neglected. *Gladwell* v. *Steggall*, 5 Bing. N. C. 733.

It is competent for a physician and his patient to enter into such a contract as they think fit, limiting the attendance to a longer or shorter period, or to a single visit if they please; and if there be no such limitation, the physician may discontinue his attendance at his election, by giving reasonable notice of his intention to do so. But if he be sent for at the time of an injury by one whose family physician he has been for years, the effect of his responding to the call will be an engagement to attend to the case so long as it requires attention, unless he gives notice to the contrary, or is discharged by the patient; and he is bound to use ordinary care and skill, not only in his attendance, but in determining when it may be safely and properly discontinued. *Ballou* v. *Prescott*, 64 Me. 305. And see *Todd* v. *Myers*, 40 Cal. 357.

Although a physician or surgeon assumes to exercise the ordinary care and skill of his profession, and is liable for injuries resulting from his failure to do so, yet, if his patient neglects to obey the reasonable instructions of the physician or surgeon and thereby contributes to the injury complained of, he cannot recover for such injury. *Geiselman* v. *Scott*, 25 Ohio St. 86. See, also, *McCandless* v. *Mc Wha*, 22 Penn. St. 261; *Haire* v. *Reese*, 7 Phil. (Penn.) 138.

The law also requires of a dentist a reasonable degree of skill and care in his professional operations, but he will not be held answerable

for injuries arising from his want of the highest attainments in his profession. *Simonds* v. *Henry*, 39 Me. 155. And it is held that a dentist or physician using chloroform or other anæsthetic agent is only bound to look to the natural and probable effects, and is not answerable for results arising from the peculiar condition or temperament of the patient, of which he has had no knowledge. *Boyle* v. *Winslow*, 5 Phil. (Penn.) 136. It has, however, been said, that a physician about to administer an anæsthetic, is bound to inform himself as to the condition of the patient's heart, lungs or other organs, which, if diseased, would warn a prudent physician against the administration of that beneficent agency. Shearm. & Redf. on Neg., § 439. And see *Jones* v. *Fay*, 4 Fost. & F. 525.

In an action against a physician or surgeon for an injury sustained by reason of alleged unskillful and careless treatment, the burden of proof is on the plaintiff, to show a want of proper knowledge and skill; but this may be shown by simple evidence of the mode of treatment pursued by the defendant in the case in question. *Leighton* v. *Sargent*, 31 N. H. 119. See *Baird* v. *Morford*, 29 Iowa, 531. In such an action, the plaintiff is not entitled to recover any thing on account of pain and suffering caused by the injury, but only for such additional pain and suffering as is produced by the negligence or want of skill of the defendant in the treatment. *Wenger* v. *Calder*, 78 Ill. 275.

That a husband may recover damages from a physician for unskillful and negligent treatment of his wife, by which he has been subjected to expense and deprived of her society, see *Mowry* v. *Chaney*, 43 Iowa, 609.

It is the duty of druggists to know the properties of the medicine which they vend, and to employ such persons as are capable of discriminating and compounding according to prescription. *Fleet* v. *Hollenkemp*, 13 B. Monr. (Ky.) 227. And if an apothecary's clerk, in filling a physician's prescription, delivers a poison instead of a harmless drug, through gross negligence, whereby the person taking it is caused great suffering and serious injury, the latter has a right of action at common law, for damages against the apothecary. *Hansford* v. *Payne*, 11 Bush (Ky.), 380; *Norton* v. *Sewall*, 106 Mass. 143; S. C., 8 Am. Rep. 298; *ante*, vol. 2, 103, 475.

It has been held that paper may be removed from the walls of rooms in which small-pox patients have been sick, if in the opinion of the attending physician it has become so soiled and besmeared with small-pox virus as to make its removal necessary to prevent the spread of small-pox; and an action cannot be sustained by the owner of the building

against a physician for advising or directing such removal. *Seavey* v. *Preble*, 64 Me. 120.

§ 17. **Railroads.** See *post*, tit. *Railroads.* As to their liability for negligence in the carriage of goods or passengers, see *ante*, Vol. 2, tit. *Carriers.* See *ante*, 663, § 7 of the present article, and *ante*, tit. *Master and Servant.* As to liability for negligence in use of fire, see *ante*, 669, § 12.

When there exists no statutory regulations defining the duties of railway companies in respect to fencing, they come within the common-law rule, and are under no obligations to make or maintain fences between their road and the adjoining lands. *Northeastern R. R. Co.* v. *Sineath*, 8 Rich. (S. C.) Law, 185; *Toledo R. R. Co.* v. *Wickery*, 44. Ill. 76; *Lord* v. *Wormwood*, 29 Me. 282; *Knight* v. *New Orleans, etc., R. R. Co.*, 15 La. Ann. 105; *Coy* v. *Utica, etc., R. R. Co.*, 23 Barb. 643; *Vandergrift* v. *Delaware R. R. Co.*, 2 Houst. (Del) 297. See *Macon, etc., R. R. Co.* v. *Baber*, 42 Ga. 305; *Mobile, etc., R. R. Co.* v. *Williams*, 53 Ala. 595. But a railway company is bound to use every reasonable care to prevent cattle from straying on the line of its road. *Buxton* v. *Northeastern Railway Co.*, L. R., 3 Q. B. 549. And if cattle are upon the track, whether lawfully or unlawfully there, and are injured or killed through the inexcusable negligence of the company's servants, the company will be held liable. *Indianapolis, etc., R. R. Co.* v. *Caldwell*, 9 Ind. 397; *Aycock* v. *Wilmington, etc., R. R. Co.*, 6 Jones' (N. C.) L. 231; *Louisville, etc., R. R. Co.* v. *Ballard*, 2 Metc. (Ky.) 177; *Trout* v. *Va. & Tenn. R. R. Co.*, 23 Gratt. 619; *Cleaveland* v. *Chicago, etc., R. R. Co.*, 35 Iowa, 220. See *North. Penn. R. R. Co.* v. *Rehman*, 49 Penn. St. 101; *Galpin* v. *Chicago, etc., R. R. Co.*, 19 Wis. 604; *Quimby* v. *Vermont Central R. R. Co.*, 28 Vt. 387; *Mobile etc., R. R. Co.* v. *Hudson*, 50 Miss. 572.

Railroad companies are now generally required by statute to fence their tracks, and to erect and maintain cattle guards at road crossings, in default of which the company is made responsible for all injuries inflicted by its agents or engines upon animals, whether by negligence or not. See *Staats* v. *Hudson River R. R. Co.*, 33 How. (N. Y.) 139; S. C., 4 Abb. Ct. App. 287; *Purdy* v. *New York, etc., R. R. Co.*, 61 N. Y. (16 Sick.) 353; *Gorman* v. *Pacific R. R. Co.*, 26 Mo. 441; *Norris* v. *Androscoggin R. R. Co.*, 39 Me. 273; *McCall* v. *Chamberlain*, 13 Wis. 637; *Buxton* v. *Northeastern Railway Co.*, L. R., 3 Q. B. 549; *Pittsburgh, etc., Railway Co.* v. *Methven*, 21 Ohio St. 586. And the liability of the company commences as soon as it takes possession of the land upon which the road is to be laid (*Holden* v. *Rutland, etc., R. R. Co.*, 30 Vt. 297; *Gardner* v. *Smith*, 7 Mich. 410. See

Toledo, etc., R. R. Co. v. *Miller*, 45 Ill. 42); and it extends to all kinds of animals that would be kept from the track by an ordinary fence, without reference to the question whether they are large enough to throw a train off the track when run over by it. *Indianapolis, etc., R. R. Co.* v. *Marshall*, 27 Ind. 300. And see *Bessant* v. *Great Western Railway Co.*, 8 C. B. (N. S.) 368; *Chicago, etc., R. R. Co.* v. *Utley*, 38 Ill. 410. But a fence need not be so constructed as to keep out dogs. *Wilson* v. *Wilmington, etc., R. R. Co.*, 10 Rich. (S. C.) L. 52.

The duty to make involves the duty to maintain fences, gates and cattle guards. If these are suffered to go to decay, or by accident are broken down so as to allow the passage of cattle, etc., through or over them, and are not repaired within a reasonable time; or if they are opened, and are allowed to remain open unnecessarily, the railway company is absolutely liable for injuries to cattle entering through the breach. *Bartlett* v. *Dubuque, etc., R. R. Co.*, 20 Iowa, 188; *McDowell* v. *New York Central R. R. Co.*, 37 Barb. 195; *Brown* v. *Milwaukie, etc., R.R. Co.*, 21 Wis. 39; *Spinner* v. *New York Central, etc., R.R.Co.*, 6 Hun (N.Y.), 600. But reasonable or ordinary diligence only is required of railroad companies in this respect (*Illinois Central R. R. Co.* v. *Swearingen*, 47 Ill. 206; *Robinson* v. *Grand Trunk Railway Co.*, 32 Mich. 322); and they are allowed a reasonable time within which to make repairs. Id.; *Toledo, etc., R. R. Co.* v. *Daniels*, 21 Ind. 256; *Antisdel* v. *Chicago, etc., R. R. Co.*, 26 Wis. 145; S. C., 7 Am. Rep. 44. So, as it would be impracticable for a railroad company to keep a constant watch of every gate and every rod of fence along the line of its road, it is but reasonable to require of the proprietors along the road, when defects have actually come to their knowledge, to make suitable efforts to apprise the company of such defects; and if they fail to do so, they cannot recover for any damage which they may sustain by reason of such defects (*Poler* v. *New York Central R. R. Co.*, 16 N. Y. [2 Smith] 476), unless the defects were known to some agent of the company whose duty it was to communicate the information to the proper officers having charge of such matters. *Indianapolis, etc., R. R. Co.* v. *Truitt*, 24 Ind. 162. And see *Davis* v. *Chicago, etc., R. R. Co.*, 40 Iowa, 292.

In England, and in some of the American States, the benefit of the statutes is confined to the owners or occupants of land immediately adjoining a railroad; and hence, the company is not bound to fence out cattle straying upon a highway running next to and parallel with the railroad (*Ricketts* v. *East India Docks, etc., Railway Co.*, 12 C. B. 160; *Towns* v. *Cheshire R. R. Co.*, 21 N. H. 363; *Eames* v. *Salem, etc., R. R. Co.*, 98 Mass. 560; *Jackson* v. *Rutland, etc., R. R. Co.*, 25

Vt. 150); but it is otherwise as it respects cattle *lawfully* upon the highway. *Midland Railway Co.* v. *Daykin*, 17 C. B. 126. It is the settled law under the statute of Vermont, that if cattle are unlawfully on the land adjoining a railroad, the owner cannot recover for injuries sustained by reason of their escape through a defective fence upon the road. *Bemis* v. *Connecticut, etc., R. R. Co.*, 42 Vt. 375; S. C., 1 Am. Rep. 339. And so, under the statute of New Hampshire. *Mayberry* v. *Concord, etc., R. R. Co.*, 47 N. H. 391; *Giles* v. *Boston, etc., R. R. Co.*, 55 id. 552. But in most of the States the benefit of the statutes extends to all owners of cattle, although they are not adjoining proprietors, and it does not appear how or whence the cattle came upon the road. *Brown* v. *Providence, etc., R. R. Co.*, 12 Gray, 55; *New Albany, etc., R. R. Co.* v. *Aston*, 13 Ind. 545; *Isbell* v. *New York, etc., R. R. Co.*, 27 Conn. 393; *Purdy* v. *New York, etc., R. R. Co.*, 61 N. Y. (16 Sick.) 353. Under the statutes of Alabama a railroad company is liable for injuries to stock when they result from the negligence of its servants or agents, whenever and wherever it may occur. If the injury occurs at or near any public road crossing, or any regular depot or stopping-place, or within the corporate limits of any town or city, or because of an obstruction which could or ought to have been perceived, no degree of diligence will excuse the company from liability, unless all the requirements of the statute have been observed. In either case, the injury being known, the burden of proof is on the railroad company to acquit itself of negligence, or to show a compliance with the statute. *Mobile, etc., R. R. Co.* v. *Williams*, 53 Ala. 595.

The owner of land adjacent to a railway, who has agreed to erect and keep in repair fences between his property and the road cannot recover for injuries to stock occasioned by want of a fence, or for defects therein. *Terre Haute, etc., R. R. Co.* v. *Smith*, 16 Ind. 102; *Warren* v. *Keokuk, etc., R. R. Co.*, 41 Iowa, 484. But such a contract between the land-owner and the company does not release the latter from its liability to others than the owner, although it may look to him for indemnity for losses occasioned by his failure to construct or repair the fence. Id. Where a railroad company binds itself by contract with the owner of the land, to fence its road through his land, the company is not liable, under such a contract, for injuries suffered by cattle, unless its servants have been negligent in some other respect than in the omission to maintain the fence. *Drake* v. *Philadelphia, etc., R. R. Co.*, 51 Penn. St. 240; *Joliet, etc., R. R. Co.* v. *Jones*, 20 Ill. 221; *Fernow* v. *Dubuque, etc., R. R. Co.*, 22 Iowa, 528. It may be added that a mere grant by a land-owner, of a right of way to a railroad company, does not impose the right to fence

upon either party; and the company is not responsible for the destruction of cattle straying upon its road, unless it is shown that such destruction was caused by the wanton and reckless negligence of its agents. *Louisville, etc., R. R. Co.* v. *Milton*, 14 B. Monr. (Ky.) 61.

So, if the owner of an animal knowingly permits it to stray upon the track of a railroad at a point where it cannot be legally fenced, and it is killed, he cannot recover unless the animal was killed by the gross negligence or willfulness of the railroad company. *Jeffersonville, etc., R. R. Co.* v. *Huber*, 42 Ind. 173; *Jeffersonville, etc., R. R. Co.* v. *Underhill*, 48 id. 389. Thus, at stations and sidings where freights or passengers are received or discharged, railroad companies are not required to fence their tracks; nor are they liable to pay for cattle that may wander upon the track at such places, and be killed without negligence on the part of the company. *Indianapolis, etc., R. R. Co.* v. *Christy*, 43 id. 143. See *Toledo, etc., R. R. Co.* v. *Owen*, 43 id. 405; *Galena, etc., R. R. Co.* v. *Griffin*, 31 Ill. 303; *Bowman* v. *Troy, etc., R. R. Co.*, 37 Barb. 516. And whether or not contributory negligence would be a defense to an action for an injury arising from the failure of a railroad company to fence as required by statute (see *Shepard* v. *Buffalo, etc., R. R. Co.*, 35 N. Y. [8 Tiff.] 641; *Peoria, etc., R. R. Co.* v. *Champ*, 75 Ill. 577), it is well settled that such negligence may defeat an action for an injury arising from the failure of the company to maintain in repair such a fence, once built. *Jones* v. *Sheboygan, etc., R. R. Co.*, 42 Wis. 306; *Lawrence* v. *Milwaukee, etc., R. R. Co.*, id. 322; *Chicago, etc., R. R. Co.* v. *Seirer*, 60 Ill. 295.

In Maryland and in Georgia non-fencing is only *prima facie* evidence of negligence (*Keech* v. *Baltimore, etc., R. R. Co.*, 17 Md. 32; *Macon, etc., R. R. Co.* v. *Davis*, 13 Ga. 68); hence, in those States, the owner of cattle cannot recover for injuries to them, if the railroad company disproves negligence on its own part or proves contributory negligence on the owner's part.

In an action against a railroad company, based on its common-law liability for negligently killing or injuring animals, the burden of proof is upon the plaintiff to show that the injury occurred by reason of a want of ordinary care upon the part of the defendant or its employees. Proof of the injury alone will not entitle him to recover. *Mobile, etc., R. R. Co.* v. *Hudson*, 50 Miss. 572; *Schnier* v. *Chicago, etc., R. R. Co.*, 40 Iowa, 337. See *Roof* v. *Railroad Co.*, 4 S. C. 61; *Mobile, etc., R. R. Co.* v. *Williams*, 53 Ala. 595.

In the absence of any statute limiting the rate of speed of railway trains, no conceivable rate is evidence of negligence *per se*. *Artz* v. *C., R. I. & P. R. R. Co.*, 44 Iowa, 284; *Maher* v. *Atlantic, etc., R.*

Co., 64 Mo. 267; *Sharrod* v. *London, etc., Railway Co.*, 4 Exch. 580. And see *Zeigler* v. *Railroad*, 5 S. C. 221. But see *Massoth* v. *Delaware, etc., Canal Co.*, 64 N. Y. (19 Sick.) 524, where it is held that, irrespective of any ordinance or law regulating the speed of railroad trains at *crossings*, the running at an excessive rate of speed is negligence, and if a collision is caused thereby, the company is liable. Whether the rate of speed is excessive or dangerous in the locality is held to be a question of fact for the jury. Whether the violation of a municipal ordinance regulating the rate of speed is, as matter of law, negligence, is, in the same case, questioned. See *Jetter* v. *New York, etc., R. R. Co.*, 2 Keyes (N. Y.), 154; S. C., 2 Abb. Ct. App. 458. But in Maryland it is held that if a railroad company does not conform to city ordinances, providing certain safeguards in the use of its engines, it is not in the lawful pursuit of its business, and is responsible for any injury which it may occasion if the party injured be not in fault. *Baltimore, etc., R. R. Co.* v. *State*, 29 Md. 252.

At a railroad crossing, neither the travelers upon the highway nor the railroad company have an exclusive right of passage, but their rights are concurrent. *North Penn. R. R. Co.* v. *Heileman*, 49 Penn. St. 60; *Pennsylvania Co.* v. *Krick*, 47 Ind. 368. The law imposes upon the company the duty of making a signal on approaching a crossing (*Indianapolis, etc., R. R. Co.* v. *Stables*, 62 Ill. 313); but while the company is held to this degree of care, it is equally the duty of a person crossing the track of a railroad to be on his guard, and to see that he is not incurring danger to himself and to his property. *Chicago, etc., R. R. Co.* v. *Hatch*, 79 Ill. 137; *Penn. R. R. Co.* v. *Beale*, 73 Penn. St. 504; 13 Am. Rep. 753; *Leavenworth, etc., R. R. Co.* v. *Rice*, 10 Kan. 426; *Stubley* v. *London, etc., Railway Co.*, L. R., 1 Exch. 13; S. C., 4 Hurlst. & N. 83. And he is not justified in omitting to look and listen for approaching trains, because the company omit to ring the bell or sound the whistle. *Havens* v. *Erie Railway Co.*, 41 N. Y. (2 Hand) 296; *Gorton* v. *Erie Railway Co.*, 45 N. Y. (6 Hand) 660; *Toledo, etc., Railway Co.* v. *Shuckman*, 50 Ind. 42; *Penn. R. R. Co.* v. *Ackerman*, 74 Penn. St. 265. So, the law does not make it the duty of a railroad company to place a flagman or watchman at highway or street crossings to warn travelers. *Beisiegel's Case*, 40 N. Y. (1 Hand) 9; *Brown* v. *Milwaukee, etc., Railway Co.*, 22 Minn. 165; *Stubley* v. *London, etc., Railway Co.*, L. R., 1 Exch. 13. And where a railroad company has been accustomed to keep a flagman at a crossing, the fact of his absence or withdrawal does not excuse a traveler from the charge of negligence in omitting the use of his senses. He has no right to interpret the absence as an assurance of safety. *Mc-*

Grath v. *New York Central, etc., R. R. Co.*, 59 N. Y. (14 Sick.) 468; S. C., 17 Am. Rep. 359. But see id. 363, *n.*

The neglect to sound the whistle or to ring the bell of a locomotive engine is not, of itself, such negligence as will justify a recovery for damage to *property* injured upon the track. *Flattes* v. *Chicago, etc., R. R. Co.*, 35 Iowa, 220. The injury must be shown to be the result of the omission, or a neglect of the duty imposed by statute, and this is to be determined by the jury. *Indianapolis, etc., R. R. Co.* v. *Blackman*, 63 Ill. 117; *Howenstein* v. *Pacific R. R. Co.*, 55 Mo. 33; *Memphis R. R. Co.* v. *Bibb*, 37 Ala. 699. See *Wakefield* v. *Conn., etc., R. R. Co.*, 37 Vt. 330; *Augusta, etc., R. R. Co.* v. *McElmurry*, 24 Ga. 75; *Pittsburg, etc., R. R. Co.* v. *Karns*, 13 Ind. 87.

A railroad company is not liable for an injury to an animal, where the escape of steam, or other necessary noise made by an engine or a train causes the animal to take fright, and the injury is the result of the fright. *Burton* v. *Philadelphia, etc., R. R. Co.*, 4 Harr. (Del.) 252; *Ohio, etc., Railway Co.* v. *Cole*, 41 Ind. 331; *Atchinson, etc., R R. Co.* v. *Loree*, 4 Neb. 446. But if the fright be produced by noise unnecessarily made, the company is liable for all the consequences. *Manchester, etc., Railway Co.* v. *Fullarton*, 14 C. B. (N. S.) 54; *Hill* v. *Portland, etc., R. R. Co.*, 55 Me. 438; *Pennsylvania R. R. Co.* v. *Barnett*, 59 Penn. St. 259; *Culp* v. *A. & N. R. R. Co.*, 17 Kan. 475.

The rule, that any person who goes upon a railroad track, incautiously, or without using all reasonable precaution to escape injury, assumes the hazard, and if injury ensues, is without remedy, has no application to a case where, by the arrangement of the company, it is made necessary for passengers to cross the track in passing to and from its depot to its trains. *Klein* v. *Jewett*, 26 N. J. Eq. 474. And where a railroad company has created extra danger, it is bound to use extra precautions, and the precautions to be adopted must be adequate to insure the safety of every passenger who exercises ordinary care. Id.

It has been held in Tennessee, that, if the trains of one railroad company, running on the road of another company, be under the exclusive control of the servants of the latter, the latter is liable for all damages occurring through negligence. But if the servants of both companies jointly control the trains, both companies are liable. *Nashville, etc., R. R. Co.* v. *Carroll*, 6 Heisk. (Tenn.) 347. And see *Mills* v. *Orange, etc., R. R. Co.*, 1 McArthur, 285. On the other hand, it has been held that, where a railroad company permits other companies or persons to exercise the franchise of running cars drawn by steam over its road, the company owning the road, and to which the law has in-

trusted the franchise, is liable for any injury done through negligence, the same as though the company owning the road were itself running the cars. *Macon, etc., R. R. Co.* v. *Mayes*, 49 Ga. 355; S. C., 15 Am. Rep. 678. So, the liability of a corporation owning a railroad, for injuries caused by negligence, is held not to be affected by the fact that the corporation have leased the road, and it is operated, at the time of an injury so caused, by the lessees; nor even by the fact that it is in charge of, and run by a receiver, unless, perhaps, when his possession and control are exclusive. *Railroad Company* v. *Brown*, 17 Wall. 445. See *Klein* v. *Jewett*, 26 N. J. Eq. 474. It is held in New York, that a railroad company which has parted with the possession and control of its road under a lease thereof to another company, containing a covenant that the lessee shall keep up the fences, is not liable to one traveling upon a highway, for damages resulting from an omission of the lessee to repair a fence which was in good order at the time of the lease and surrender of possession. *Ditchett* v. *Spuyten Duyvil, etc., R. R. Co.*, 67 N. Y. (22 Sick.) 425. But see *Mahoney* v. *Atlantic, etc., R. R. Co.*, 63 Me. 68.

By statute, in some of the States, the lessees of railroads are made liable, equally with the corporations owning the tracks, for the want of fences. See *Clement* v. *Canfield*, 28 Vt. 302; *Wyman* v. *Penobscot, etc., R. R. Co.*, 46 Me. 162; *McCall* v. *Chamberlain*, 13 Wis. 637; *Tracy* v. *Troy, etc., R. R. Co.*, 55 Barb. 529; S. C. affirmed, 38 N. Y. (11 Tiff.) 433. In Iowa, where two railroad companies operate trains on the same road, one being the owner and the other a lessee, each is liable only for stock injured or killed by its trains, by reason of the road being unfenced, and not for that injured or killed by the trains of the other. *Stephens* v. *Davenport, etc., R. R. Co.*, 36 Iowa, 327. In Illinois, both companies are held responsible. *Toledo, etc., R. R. Co.* v. *Rumbold*, 40 Ill. 143. While, under the Indiana statute, the company owning a railroad is liable for stock killed by a train on the road, without reference to the company or persons who may have been running the locomotive or cars that caused the injury, and such company may be sued alone. *Ft. Wayne, etc., R. R. Co.* v. *Hinebaugh*, 43 Ind. 354.

In Illinois, it is held to be negligence in a railway company to permit or suffer weeds or any thing else to grow upon its right of way to such a height as to materially obstruct the view of a highway crossing; and if injury results to stock at such crossing, that might have been avoided but for such obstruction, the company will be liable. *Indianapolis, etc., R. R. Co.* v. *Smith*, 73 Ill. 112.

§ 18. **Real property.** It is a general principle of the common law, that the owner of real property is bound so to control its use as not to produce injury to others. See *Earle* v. *Hall*, 2 Metc. (Mass.) 353. He is not, however, to be restrained in the prudent and reasonable use of his land, and he is not chargeable with the negligent acts of another in doing work thereon, unless he stands in the character of employer to the one guilty of the negligence, or unless the work as authorized by him would necessarily produce the injuries complained of, or they are occasioned by the omission of some duty incumbent upon him. There is held to be no distinction, in this respect, between an owner of real and of personal property, and the former is held to no stricter liability for the negligent use and management of his real estate, or of negligent acts upon it by others, than is the latter as to a similar use of his property. *Reedie* v. *London, etc., Railway Co.*, 4 Exch. 244; *Butler* v. *Hunter*, 7 Hurlst. & N. 826; *Robinson* v. *Webb*, 11 Bush (Ky.), 464; *McCafferty* v. *Spuyten Duyvil, etc., R. R. Co.*, 61 N. Y. (16 Sick.) 178; S. C., 48 How. 44; 19 Am. Rep. 267. Thus, it is held in the case last cited, that a railroad corporation which has let by contract the entire work of constructing its road, and has no control over those employed in the work, is not liable for injuries to a third person, occasioned by negligent acts in doing the work of those thus employed, such as blasting in a manner to throw rocks upon the lands of another. And see *King* v. *Livermore*, 9 Hun (N. Y.), 301

The owner may use his land in such reasonable way as his judgment shall dictate, either by making excavations or superstructures thereon, subject, however, to the implied condition that he shall not thereby interfere with his neighbor in the enjoyment of the same right in respect to his adjacent land. Each is entitled to have his soil in its natural state sustained, when necessary, by the lateral support of the adjacent soil of the other, but neither has the right to burden the land of the other with the support of any additional weight, as that would be to make the land of the one servient to that of the other. *Stevenson* v. *Wallace*, 27 Gratt. (Va.) 77; *City of Quincy* v. *Jones*, 76 Ill. 231; S. C., 20 Am. Rep. 243. The owner of a building standing upon the line or boundary of his land may, however, acquire a right to the lateral support of the same from the soil of the adjacent owner by contract or by prescription, and this right will constitute a burden upon the adjacent property. Id. And see Vol. 2, tit. *Easements*. But see *Mitchell* v. *Mayor of Rome*, 49 Ga. 19; S. C., 15 Am. Rep. 669. In general, however, if injury is sustained to a building in consequence of the withdrawal of the lateral support of the neighboring soil of another, where it has been withdrawn with reasonable skill and care to avoid

unnecessary injury, there can be no recovery. *Beard* v. *Murphy*, 37 Vt. 99; *McGuire* v. *Grant*, 24 N. J. Law, 356; *Moody* v. *McClelland*, 39 Ala. 45; *City of Cincinnati* v. *Penny*, 21 Ohio St. 499; S. C., 8 Am. Rep. 73. And see *ante*, tit. *Injunctions*. But, if a person, by carelessness in making an excavation in his own ground, causes the fall of, or injury to a house erected on the land adjoining, he is liable in damages for the injury. *Baltimore, etc., R. R. Co.* v. *Reaney*, 42 Md. 117.

The owner or occupant of real property is bound, so far as he may be able to do so by the exercise of ordinary care, to keep it in such condition, that it will not by any insufficiency for the purpose to which it is put injure any adjoining owner or occupant, or any lawful passer by. *White* v. *Phillips*, 15 C. B. (N. S.) 245; *Schwartz* v. *Gilmore*, 45 Ill. 455; *Mullen* v. *St. John*, 57 N. Y. (12 Sick.) 567; 15 Am. Rep. 530. And he is bound, also, to use care and diligence to keep the premises in a safe condition for the access of persons who come thereon by his invitation, express or implied, for the transaction of business. *Carleton* v. *Franconia Iron, etc., Co.*, 99 Mass. 216. And see *Indermaur* v. *Dames*, L. R., 2 C. P. 311; *Holmes* v. *Northeastern Railway Co.*, L. R., 4 Exch. 254. But a proprietor is not bound to make his premises safe to persons entering for their own convenience or pleasure without his invitation, or without inducement by the use to which he has appropriated them, either expressly or by some preparatory adaptation thereto which would naturally and reasonably lead persons to suppose that they might properly and safely enter. *Straub* v. *Soderer*, 53 Mo. 38. And see *Nicholson* v. *Erie Railway Co.*, 41 N. Y. (2 Hand) 525; *Zoebisch* v. *Tarbell*, 10 Allen, 385; *Gautret* v. *Egerton*, L. R., 2 C. P. 371; *ante*, 653, § 1. So, it has been said that a landlord who lets a house in a dangerous state is not liable to the tenant's customers or guests for accidents. *Robbins* v. *Jones*, 15 C. B. (N. S.) 221, 240. But see *Godley* v. *Hagerty*, 20 Penn. St. 387; *Kaiser* v. *Hirth*, 46 How. (N. Y.) 161; S. C., 4 Jones & Sp. 344. And in a recent case it is held that the mere fact that the owner of a building has leased it does not exempt him from liability for a personal injury occasioned by a defect in the entrance-way thereto, left in its original construction. *Larue* v. *Farren Hotel Co.*, 116 Mass. 67. And see *Anderson* v. *Dickie*, 1 Robt. (N. Y.) 238; S. C., 17 Abb. 83; 26 How. 105. But the owner of a building with whom the tenant has covenanted "to make all needful and proper repairs, both internal and external," is not liable to a person injured by a fall of snow and ice naturally collected on the roof, which by due precaution the tenant might have prevented. *Leonard* v.

Storer, 115 Mass. 86; 15 Am. Rep. 76. And see *Pretty* v. *Bickmore*, L. R., 8 C. P. 401; S. C., 6 Eng. R. 182.

A person having the right to excavate a street or other land is bound to do it with all necessary and reasonably practicable skill and care, so as to save the neighboring proprietors from any injurious consequences, which, by overflow or otherwise, might result from changing the natural surface of the ground, and if he does not use such skill and care, he is liable for damages. *Rau* v. *Minnesota, etc., R. R. Co.*, 13 Minn. 442. See, also, *Livingston* v. *McDonald*, 21 Iowa, 160; *Robinson* v. *Black Diamond Coal Co.*, 50 Cal. 160. So, one who, in building or repairing his house, obstructs the public gutter in front with building materials, is liable for damage caused by the overflow of the water from very heavy rains into another's cellar. *Ball* v. *Armstrong*, 10 Ind. 181. And the occupant of upper rooms in a building must use in the conduct of his business such care, caution, attention and discretion, as an ordinarily prudent man would put forth to prevent injury being sustained by the occupant below, from water or other substances leaking through into the rooms of the latter. *Warren* v. *Kauffman*, 2 Phil. (Penn.) 259; *Stapenhorst* v. *American Manuf. Co.*, 46 How. (N. Y.) 510; S. C., 15 Abb. (N. S.) 355; 4 Jones & Sp. 392; *Killion* v. *Power*, 51 Penn. St. 429; *Blythe* v. *Proprietor, etc.*, 11 Exch. 781. And see *Locust Mountain, etc.* v. *Gorvell*, 9 Phil. (Penn.) 247. But if he exercise such care, caution, etc., he is not liable. *Brown* v. *Elliott*, 45 How. (N. Y.) 182; S. C., 4 Daly, 329; *Rudolphy* v. *Fuchs*, 44 How. (N. Y.) 155. So, one, who stores water on his own land, and uses all reasonable care to keep it safely there, is not liable to an action for an escape of the water which injures his neighbor, if the escape be caused by an agent beyond his control, such as a storm, which amounts to *vis major*, or the act of God, in the sense that it is practically, though not physically, impossible to resist it. *Nichols* v. *Marsland*, L. R., 10 Exch. 255; S. C., 14 Eng. R. 538. The proprietor of a drain, who uses ordinary care and prudence in closing it, is not liable for damage caused to his neighbor by the sudden overflow of the drain (*Rockwood* v. *Wilson*, 11 Cush. 221), and an overflow, caused by a frost more severe than had been known for twenty-five years, bursting the defendant's pipes, was held to afford no ground of action. *Blyth* v. *Proprietors, etc.*, 11 Exch. 781.

A man may make an excavation on his own land, and leave it unguarded without incurring any liability to strangers passing over the land who may be injured by falling into it (*Bolch* v. *Smith*, 7 Hurlst. & N. 736; *Knight* v. *Abert*, 6 Penn. St. 472; *Binks* v. *South Yorkshire Railway Co.*, 3 Best & Sm. 244; *Howland* v. *Vincent*, 10 Metc.

[Mass.] 371), unless the excavation is made so near to a public road or way as to constitute a public nuisance. *Hounsell* v. *Smyth*, 7 C. B. (N. S.) 731; *Vale* v. *Bliss*, 50 Barb. 358. And the occupant of premises was held not to be liable to one not invited thereon, and who, while on the premises, was injured by falling into a vat of boiling liquor used by the defendant in the usual and customary way. *Victory* v. *Baker*, 67 N. Y. (22 Sick.) 366. See, also, *Pierce* v. *Whitcomb*, 48 Vt. 127; S. C., 21 Am. Rep. 120. But see *Hydraulic Works Co.* v. *Orr*, 83 Penn. St. 332. It is, however, regarded as culpable negligence for the owner of land to leave a pit or other excavation in such an unguarded state as to injure a person having a right to be upon the land, and using that right with ordinary care. *Williams* v. *Groucott*, 4 Best & Sm. 149; *Chapman* v. *Rothwell*, 1 El. Bl. & El. 168. And if the owner places a spring gun on his premises, or does other like acts imminently dangerous to human life, and designed to endanger it, he may be held responsible even to a trespasser. *Bird* v. *Holbrook*, 4 Bing. 628; *Hooker* v. *Miller*, 37 Iowa, 613; S. C., 18 Am. Rep. 18; *Gray* v. *Combs*, 7 J. J. Marsh. (Ky.) 478; *State* v. *Moore*, 31 Conn. 479. But a house may be thus protected from burglars. Id. And in England, it has long been usual for the proprietor of land to place spring guns and other deadly engines upon an inclosure, so concealed as not to be seen, to wound, kill or destroy any man or animal that comes upon the place; and it is there held that if proper notice be given, he is justified in inflicting any injury on men or animals, trespassing on the grounds, even to the taking of life. *Ilott* v. *Wilkes*, 3 Barn. & Ald. 304. See *Johnson* v. *Patterson*, 14 Conn. 1.

There is held to be no implied obligation between the owners of distinct parts of a building, which will enable either to maintain an action against the other for mere refusal and neglect to repair his tenement, whereby the plaintiff's part is injured. *Pierce* v. *Dyer*, 109 Mass. 374; 12 Am. Rep. 716.

§ 19. **Sheriffs.** A sheriff, or other like officer, charged with the execution of process, is liable in a civil action to a person injured by his neglect to exercise due diligence in the service thereof. *White* v. *Wilcox*, 1 Conn. 347; *Moulton* v. *Jose*, 25 Me. 76; *Kinnard* v. *Willmore*, 2 Heisk. (Tenn.) 619; *Ransom* v. *Halcott*, 9 How. (N. Y.) 119; S. C., 18 Barb. 56. And a sheriff is liable for all official neglect or misconduct of his deputy, and also for his acts, not required by law, where he assumes to act under color of office. *Campbell* v. *Phelps*, 17 Mass. 244; *McIntyre* v. *Trumbull*, 7 Johns. 35. But he is so liable only while the relation between them exists (*Blake* v. *Shaw*, 7 Mass. 505), and he is not responsible for the neglect of any act or duty which the law

does not require the deputy officer to perform. *Clute* v. *Goodell*, 2 McLean (C. C.), 193; *Harriman* v. *Wilkins*, 20 Me. 93. And if a deputy sheriff has authority from the creditor to manage an execution according to his discretion, the sheriff is discharged from his liability for the official neglect of such deputy. *Fletchers* v. *Bradley*, 12 Vt. 22; *Samuel* v. *Commonwealth*, 6 Monr. (Ky.) 173. And see *Root* v. *Wagner*, 30 N. Y. (13 Tiff.) 9.

An action would not lie against a sheriff, at common law, for not returning an execution or other writ (*Commonwealth* v. *McCoy*, 8 Watts, 153; *Clark* v. *Foxcroft*, 6 Me. 296); but in most of the States such an action is given by statute, and the sheriff is made *prima facie* liable for the whole debt, if he neglects to return the writ within the return day. *McGregor* v. *Brown*, 5 Pick. 170; *Swezey* v. *Lott*, 21 N. Y. (7 Smith) 481; *Moore* v. *Floyd*, 4 Oreg. 101. So, if the sheriff make a false return, he is *prima facie* liable to the creditor for the amount of the debt with interest (*Goodrich* v. *Starr*, 18 Vt. 227; *McArthur* v. *Pease*, 46 Barb. 423); and he is liable to any one else, though not a party to the suit, who is damaged by the return. *Cozine* v. *Walter*, 55 N. Y. (10 Sick.) 304. And in an action against the sheriff for a false return, it does not lie with him to urge that the plaintiff's judgment is invalid under the bankrupt act, and that, therefore, no act done under, or by color of it could inure to the plaintiff's benefit. *Watson* v. *Brennan*, 7 Jones & Sp. (N. Y.) 81.

If a sheriff keeps goods levied on in an unsafe place, or exposes them to destruction, he is liable for the damage sustained. *Conover* v. *Gatewood*, 2 A. K. Marsh. (Ky.) 568; *Jenner* v. *Joliffe*, 9 Johns. 381. But he is not an insurer of the goods (*Price* v. *Stone*, 49 Ala. 543); and is only liable for the same degree of diligence as an ordinary bailee for hire. *Bridges* v. *Perry*, 14 Vt. 262; *Moore* v. *Westervelt*, 27 N. Y. (13 Smith) 234; *Kendall* v. *Morse*, 43 N. H. 553. But see *Hartlieb* v. *McLane*, 44 Penn. St. 510; *Browning* v. *Hanford*, 5 Denio, 586. A sheriff, who has levied an execution upon personal property, and has been deprived of the possession thereof by writ of replevin at the suit of a claimant, is not liable for the debt and damages on the motion of the judgment creditor, although the latter has given him a bond of indemnity. *Swain* v. *Alcorn*, 50 Miss. 320.

A sheriff who seizes property under an execution, and does not sell it within a reasonable time, is liable, for his non-performance, to the party injured, unless he has a legal excuse. *State* v. *Herod*, 6 Blackf (Ind.) 444; *Jacobs* v. *Humphrey*, 2 Cr. & M. 413; *Fisher* v. *Vanmeter*, 9 Leigh (Va.), 18. The extent of the liability for failing to sell is the value of the property, if it is finally lost and the defendants are

insolvent, or if the only solvent defendant is released by the laches of the officer. *Royse* v. *Reynolds*, 10 Bush (Ky.), 286.

The sheriff is bound to exercise reasonable care and judgment in the management of his sales. His duty is to make the money on the execution, if by fair judgment and skill it can be done according to the modes provided by law. And although his discretion should be liberally considered in the absence of bad faith, yet he is responsible for a clear neglect of its proper exercise, according to the measure stated. *Wright* v. *Child*, L. R., 1 Exch. 358; *Todd* v. *Hoagland*, 36 N. J. Law, 352.

Where a sheriff, who, at the expiration of his term of office, has in his hands process not fully executed, dies before the complete execution thereof, his late under-sheriff becomes substituted in his place, and assumes all his duties and liabilities in respect to such process; and for moneys collected by him, by virtue thereof, he is personally liable. *Newman* v. *Beckwith*, 61 N. Y. (16 Sick.) 205.

As to the liability of the sheriff for an escape, see *ante*, Vol. 3, tit. *Escape*.

§ 20. **Telegraphs.** The liability of telegraph companies for negligence has been said to rest entirely upon contract. *Playford* v. *United Kingdom Telegraph Co.*, L. R., 4 Q. B. 706. But the better opinion is, that there is an obligation resting upon them independently of any contract, and which arises from the public nature of their employment. See *Western Union Telegraph Co.* v. *Carew*, 15 Mich. 525; *Parks* v. *Alta California Telegraph Co.*, 13 Cal. 422; *New York, etc., Telegraph Co.* v. *Dryburg*, 35 Penn. St. 298. The business, though pursued for reward, is designed for the general convenience of the public; and like the business of common carriers, the interests of the public are so largely incorporated with it, that it differs from ordinary bailments which parties are at liberty to enter into or not, as they please. *DeRutte* v. *New York, etc., Telegraph Co.*, 30 How. (N. Y.) 403; S. S., 1 Daly, 547. Telegraph companies in one sense may be called common carriers, as they are engaged in a public employment, and are bound to transmit, for all persons, messages delivered to them for that purpose. But the analogy between common carriers of goods and common carriers of messages is not perfect, and their responsibility differs in a manner corresponding to the difference in the nature of the services they perform. *Aiken* v. *Telegraph Co.*, 5 So. Car. 358; *Grinnell* v. *Western Union Tel. Co.*, 113 Mass. 299; S. C., 18 Am. Rep. 485. The rule is stated to be, that, in the absence of any special contract limiting or regulating the liability of the latter, they do not insure the safe and accurate transmission of messages, but they are bound to

transmit them with care and diligence adequate to the business which they undertake, and if they fail in such care and diligence, they become responsible. *Breese* v. *U. S. Tel. Co.*, 48 N. Y. (3 Sick.) 132; S. C., 8 Am. Rep. 526; *Sweetland* v. *Illinois, etc., Tel. Co.*, 27 Iowa, 433; S. C., 1 Am. Rep. 285; *Ellis* v. *Am. Tel. Co.*, 13 Allen, 226; *Washington, etc., Tel. Co.* v. *Hobson*, 15 Gratt. (Va.) 122.

A telegraph company, holding itself out to the public as ready and willing to transmit messages, pledges to the public the use of instruments proper for the purpose, and that degree of skill and care adequate to accomplish the object proposed, and in case of failure in any of these respects it is undoubtedly liable for the damages resulting. *Bartlett* v. *Western Union Tel. Co.*, 62 Me. 209; S. C., 16 Am. Rep. 437. Circumstances in the nature of the instrumentality employed, which in a particular case prevent the proper accomplishment of the undertaking, such as a thunder storm, or the sickness of a skilled operator, may, however, be a sufficient excuse for delay; but a mistake, such as translating an order for "sacks" of salt as an order for "casks" of salt, is to be regarded as the result of negligence for which the company are liable. *Leonard* v. *New York, etc., Tel. Co.*, 41 N. Y. (2 Hand) 544; S. C., 1 Am. Rep. 446. See, also, *Dufbury* v. *Tel. Co.*, 3 Phil. (Penn.) 408. And in general, where the terms of a message sent by telegraph are seriously changed, and the name of the sender entirely disfigured, either by the transmission or the copying, it will import negligence on its face. *Western Union Tel. Co.* v. *Meek*, 49 Ind. 53.

When a telegraph company contracts to deliver market reports, it binds itself to procure and furnish *correct* reports, and is responsible for the loss occasioned by any mistake in them. If the company undertakes to furnish such reports from a point beyond its own line, it will be presumed, in the absence of evidence to the contrary, that the report was correctly delivered to it at the place where its own line commences; and the burden is upon the company to show that a mistake in the report occurred from causes which would relieve it from liability. *Turner* v. *Hawkeye Tel. Co.*, 41 Iowa, 458; S. C., 20 Am. Rep. 605.

Telegraphic messages sent in cipher, the purport of which is entirely unknown to the officers or agents of the company, fall within that principle of the law of common carriers which exempts the carrier from responsibility on the ground of concealment by the owner of the goods in respect to their nature, amount, and value (see *ante*, Vol. 2, 18, 29); and in such case, upon a breach of the contract to transmit and deliver, the sender can recover only nominal damages, or the amount paid for

sending the message. *Candee* v. *Western Union Tel. Co.*, 34 Wis. 471; S. C., 17 Am. Rep. 452.

Telegraph companies have the right to make reasonable rules for the conduct of their business, and can limit their liability for mistakes not occasioned by gross negligence or willful misconduct, by notice brought home to the sender of the message or by special contract. *Breese* v. *U. S. Tel. Co.*, 48 N. Y. (3 Sick.) 132; S. C., 8 Am. Rep. 526. And where the company furnishes its customers printed blanks containing the terms upon which it proposes to transmit messages, a delivery to the company for transmission, of a message written upon one of such blanks, is held to be an acceptance of the terms and constitutes a contract between the parties. *Young* v. *Western Union Tel. Co.*, 65 N. Y. (20 Sick.) 163; *Passmore* v. *Western Union Tel. Co.*, 78 Penn. St. 238; *Camp* v. *Western Union Tel. Co.*, 1 Metc. (Ky.) 164; *Wann* v. *Western Union Telegraph Co.*, 37 Mo. 472; *Wolf* v. *Western Union Tel. Co.*, 62 Penn. St. 83; S. C., 1 Am. Rep. 387. According to the weight of authority, a regulation that the liability of the company for any mistake or delay in the transmission or delivery of a message, or for not delivering the same, shall not extend beyond the sum received for sending it, unless the sender orders the message to be repeated by sending it back to the office which first received it, and pays half the regular rate additional, is a reasonable precaution to be taken by the company, and binding upon all who assent to it, so as to exempt the company from liability beyond the amount stipulated, for any cause except willful misconduct or gross negligence. Id.; *Grinnell* v. *Western Union Tel. Co.*, 113 Mass. 299; S. C., 18 Am. Rep. 485. But it is against public policy to permit telegraph companies to secure exemption from the consequences of their own gross negligence, by contract. *Western Union Tel. Co.* v. *Graham*, 1 Col. 230; S. C., 9 Am. Rep. 136; *Hibbard* v. *Western Union Tel. Co.*, 33 Wis. 558; S. C., 14 Am. Rep. 775; *Bartlett* v. *Western Union Tel. Co.*, 62 Me. 209; S. C., 16 Am. Rep. 437. And it is held in Illinois, that notwithstanding any special conditions which may be contained in a contract between a company and the sender of a message, restricting the liability of the former in case of an inaccurate transmission of the message, the company will still be liable for mistakes happening by their own fault, such as defective instruments, or carelessness or unskillfulness of their operators, but not for mistakes occasioned by uncontrollable causes. *Tyler* v. *Western Union Tel. Co.*, 60 Ill. 421; S. C., 14 Am. Rep. 38. And see *Western Union Tel. Co.* v. *Meek*, 49 Ind. 53.

It has been held that express stipulations in the contract for transmission bind the receiver as well as the sender. *Aiken* v. *Western*

Union Tel. Co., 5 S. C. 358. But see *contra*, *LaGrange* v. *Southwestern Tel. Co.*, 25 La. Ann. 383.

It was adjudged in a New York case that a telegraph company, who has been paid the whole compensation for transmission, irrespective of the question of contract, are liable in an action for negligence, to a party interested, for loss and damages in transmitting to him an erroneous message, though the error or mistake was made by one of the companies through whom they transmitted it. *DeRutte* v. *New York, etc., Tel. Co.*, 30 How. (N. Y.) 403; S. C., 1 Daly, 547. But see *Leonard* v. *New York, etc., Tel. Co.*, 41 N. Y. (2 Hand) 544; S. C., 1 Am. Rep. 446; *Baldwin* v. *U. S. Tel. Co.*, 45 N. Y. (6 Hand) 744; S. C., 6 Am. Rep. 165.

If a telegraph company, engaged in constructing its line through a public and frequented street of a city, allows its wire to remain suspended across the street in a manner which obstructs travel, without guards, flags, or other notice to the public of the obstruction, it is held to be guilty of gross negligence. *Western Union Tel. Co.* v. *Eyser*, 2 Col. T. 141. And it is gross negligence in a telegraph company to employ an operator who is ignorant of the existence of a county town which is one of the stations on its line. *Western Union Tel. Co.* v. *Buchanan*, 35 Ind. 429; S. C., 9 Am. Rep. 744.

§ 21. **Water-courses.** It is an established general rule that every proprietor of land through which a natural water-course runs has an equal right, inseparably annexed to the soil, to the use of the water, for every useful purpose to which it can be applied, as it is accustomed to run, without diminution or alteration. *Wadsworth* v. *Tillotson*, 15 Conn. 366; *Cowles* v. *Kidder*, 24 N. H. 364; *Pugh* v. *Wheeler*, 2 Dev. & Bat. (N. C.) L. 50. But this is a mere privilege, running with the land, and the owner of the soil has no property in the water itself. *Hill* v. *Newman*, 5 Cal. 445; *Van Hoesen* v. *Coventry*, 10 Barb. 518. And to maintain the right to a water-course it must be made to appear that the water usually flows in a certain direction and by a regular channel with banks or sides. It need not be shown to flow continually, and it may at times be dry, but it must have a well-defined and substantial existence. *Wagner* v. *Long Island R. R. Co.*, 2 Hun (N. Y.), 633; S. C., 5 Sup. Ct. (T. & C.) 163; *Barnes* v. *Sabron*, 10 Nev. 217; *Eulrich* v. *Richter*, 37 Wis. 226. The use of the water of a stream for the purpose of irrigation is not permitted in England (*Embrey* v. *Owen*, 6 Exch. 353; *Sampson* v. *Hoddinott*, 1 C. B. [N. S.] 590); but in this country it is more generally allowed. *Elliot* v. *Fitchburg R. R. Co.*, 10 Cush. 194. No proprietor can, however, under color of that right, or for the actual purpose of irrigating his

own land, wholly abstract or divert the water-course, or take such an unreasonable quantity of water, as to deprive other proprietors of the substantial benefits which they might derive from it, if not diverted or used unreasonably. *Arnold* v. *Foot*, 12 Wend. 330; *Chatfield* v. *Wilson*, 27 Vt. 670; *Fleming* v. *Davis*, 37 Tex. 173; *Blanchard* v. *Baker*, 8 Me. 253; *Randall* v. *Silverthorn*, 4 Penn. St. 173; *Evans* v. *Merriweather*, 4 Ill. 496.

In general, a riparian owner has no legal right to increase or diminish the quantity of water which flows through or along his land to the injury of another land-owner on the stream (*Merritt* v. *Parker*, 1 Coxe [N. J.], 460; *Chasemore* v. *Richards*, 2 Hurlst. & N. 168); unless he has gained such right by grant or prescription. *Bucklin* v. *Truell*, 54 N. H. 122; *Belknap* v. *Trimble*, 3 Paige, 577. But a riparian owner may erect a dam across a stream, using an ordinary and reasonable degree of care, and for the indirect and consequential damages thereby caused the law gives no redress. *Hartzall* v. *Sill*, 12 Penn. St. 248. He is, however, bound so to construct the dam that it will resist not only ordinary freshets, but also such extraordinary floods as may be reasonably anticipated. *Gray* v. *Harris*, 107 Mass. 492; S. C., 9 Am. Rep. 61; *Bailey* v. *Mayor of New York*, 3 Hill, 531; *Everett* v. *Hydraulic, etc., Co.*, 23 Cal. 225. And he has no right to detain the water longer than is necessary for its profitable enjoyment, and he must return it to its natural channel before it passes upon the land of the proprietor below. *Pool* v. *Lewis*, 41 Ga. 162; S. C., 5 Am. Rep. 526.

So, a mill-owner has the right, in a reasonable manner, to discharge the waste from his mill, such as saw-dust, shavings, etc., into the stream, in the ordinary course of using such mill; but he has not the right, wantonly and needlessly and out of the ordinary course in such cases, and not in the service of his substantial interest and benefit in the use of his mill in a reasonable manner, to throw such waste, or permit it to go into the stream, to the injury of proprietors below. *Jacobs* v. *Allard*, 42 Vt. 303; S. C., 1 Am. Rep. 331.

The maxim, *aqua currit et debet currere*, absolutely prohibits an individual from interfering with the natural flow of water to the prejudice of another riparian owner upon any pretense, and subjects him to damages at the suit of any party injured without regard to any question of negligence or want of care. *Parker* v. *Griswold*, 17 Conn. 299; *Pratt* v. *Lamson*, 2 Allen, 275; *Crooker* v. *Bragg*, 10 Wend. 260; *Overton* v. *Sawyer*, 1 Jones' (N. C.) L. 308; *Chatfield* v. *Wilson*, 27 Vt. 670. And it is held that if one raises the water in a natural stream above its natural banks, and to prevent its overflow constructs

embankments which answer the purpose perfectly, but by the pressure of the water upon the natural banks of the stream percolation takes place, so as to drown the adjoining lands of another, an action will lie for the damages occasioned thereby. And it matters not whether the damage is occasioned by the overflow of, or the percolation through the natural banks, so long as the result is occasioned by an improper interference with the natural flow of the stream. *Pixley* v. *Clark*, 35 N. Y. (8 Tiff.) 520. But where one interferes with the current of a running stream, and causes damage to those who are entitled to have the water flow in its natural channel, such interference being in pursuance of legislative authority granted for the purpose of constructing a work of public utility, upon making compensation, he is liable only for such injury as results from the want of due skill and care in so arranging the necessary works as to avoid any danger reasonably to be anticipated from the habits of the stream and its liability to floods. *Bellinger* v. *New York Central R. R. Co.*, 23 N. Y. (9 Smith) 42. See, also, *Blood* v. *Nashua, etc., R. R. Co.*, 2 Gray, 137; *Denslow* v. *New Haven, etc., Co.*, 16 Conn. 98; *Conhocton, etc., R. R. Co.* v. *Buffalo, etc., R. R. Co.*, 3 Hun (N. Y.), 523; S. C., 5 Sup. Ct. (T. & C.) 651.

Nor will an action lie against a party for so using or changing the surface of his own land as to dam up and obstruct the flow of *surface* water, or water collected by thaws and freshets and which had formerly been accustomed to flow over and across the lands of his neighbor. *Wagner* v. *Long Island, etc., R. R. Co.*, 2 Hun (N. Y.), 633; S. C., 5 Sup. Ct. (T. & C.) 163; *Wheeler* v. *Worcester*, 10 Allen, 591; *Rawstron* v. *Taylor*, 11 Exch. 369. See *post*, tit. *Water and Watercourses.*

§ 22. **Miscellaneous.** It is a well-settled rule that if one do a lawful act upon his own premises he cannot be held responsible for injurious consequences that may result from it, unless it was so done as to constitute actionable negligence. *Rockwood* v. *Wilson*, 11 Cush. 221. Thus, where one places a steam boiler upon his premises and operates it with care and skill, so that it is no nuisance, in the absence of proof of fault or negligence upon his part, he is not liable for damages to his neighbor occasioned by the explosion of the boiler. *Losee* v. *Buchanan*, 51 N. Y. (6 Sick.) 476; S. C., 10 Am. Rep. 623; *Marshall* v. *Welwood*, 38 N. J. Law, 339; S. C., 20 Am. Rep. 394.

But the owner of a building adjoining a street or highway is under a legal obligation to take reasonable care that it is kept in proper condition, so that it shall not fall into the street or highway and injure persons lawfully there. And from the happening of such an accident, in the absence of explanatory circumstances, negligence will be pre-

sumed and the burden is upon the owner of showing the exercise of ordinary care. *Mullen* v. *St. John*, 57 N. Y. (12 Sick.) 567; S. C., 15 Am. Rep. 530. And see *ante*, 691, § 18. So, it is the duty of persons engaged in blasting to give notice to all persons about passing within the limits of possible danger, at the time of firing the blast, and omitting to do this, if persons passing are injured by the discharge, the question of negligence in omitting to give the notice is held to be one for the jury and their finding thereon is conclusive. *Driscoll* v. *Newark, etc., Co.*, 37 N. Y. (10 Tiff.) 637. And see *St. Peter* v. *Denison*, 58 N. Y. (13 Sick.) 416; S. C., 17 Am. Rep. 258.

The keeping of a dock, pier or wharf, built into or adjacent to navigable waters, for the purposes of loading and unloading vessels, gives a general license to all persons to go upon and use it in the manner and for the purposes contemplated; and so long as it is kept open, the duty rests upon the occupant or owner of keeping it in a safe condition so that those having a lawful right can go upon it without incurring risk of injury. See *White* v. *Phillips*, 15 C. B. (N. S.) 245; *Wendell* v. *Baxter*, 12 Gray, 494; *Pittsburgh* v. *Grier*, 22 Penn. St. 54. And a person hired and acting as a laborer in the usual and accustomed business transacted upon a pier is there by right and for a lawful purpose, and can maintain an action for damages resulting from a neglect to perform this duty. *Swords* v. *Edgar*, 59 N. Y. (14 Sick.) 28; S. C., 17 Am. Rep. 295. See, also, *Smith* v. *London, etc., Dock Co.*, L. R., 3 C. P. 326.

A high degree of care is required to be exercised by all persons using fire arms in the immediate vicinity of others, no matter how lawful such use may be. See *Castle* v. *Duryea*, 32 Barb. 480; S. C. affirmed, 2 Keyes, 169; 1 Abb. Ct. App. 327; *ante*, Vol. 1, tit. *Accident*. And a party is held liable for damages incident to his gross neglect in handling a gun, though accidentally discharged. *Chataigne* v. *Bergeron*, 10 La. Ann. 699. So, if a person carelessly discharges a gun, by which a horse is frightened to the injury of its owner, an action lies for the injury. *Cole* v. *Fisher*, 11 Mass. 137. An action will also lie for frightening a horse by beating a drum on or near the highway. *Loubz* v. *Hafner*, 1 Dev. (N. C.) L. 185. But one who is hunting in a "wilderness" is not bound to anticipate the presence, within range of his shot, of another man, and is not liable for an injury caused unintentionally by him to a person of whose presence he was not aware. *Bizzell* v. *Booker*, 16 Ark. 308.

Since loaded fire arms are dangerous weapons, it is negligence to place them in the hands of children, or others incompetent to use them with due care. Thus, where the defendant, being possessed of a

loaded gun, sent a young girl to fetch it with directions to take the priming out, which was accordingly done and an injury accrued to the plaintiff's son in consequence of the girl's presenting the gun at him and drawing the trigger when the gun went off, it was held that the defendant was liable for damages in an action on the case. *Dixon* v. *Bell*, 5 Maule & Selw. 198. And a declaration that the defendant, knowing that the plaintiff, a child eight years old, had neither experience in, nor knowledge of the use of gunpowder, and was an unfit person to be intrusted with it, sold and delivered gunpowder to him, and that he, in ignorance of its effects, and using that care of which he was capable, exploded it and was burned thereby, sets forth a good cause of action. *Carter* v. *Towne*, 98 Mass. 567. But the owner of a vessel, by merely permitting the master to have the custody of a gun and ammunition, with other equipments on board of the vessel, does not become responsible for the careless use thereof by one of the crew. The mere possession and control of such gun and ammunition cannot create or imply permission, much less authority or duty to make use of them in the face of the positive orders of the owner to the contrary. *Haack* v. *Fearing*, 35 How. (N. Y.) 459; S. C., 4 Abb. (N. S.) 297; 5 Robt. 528.

The streets of a village or city, and highways elsewhere, are not unfrequently appropriated to the uses of exploding fire-crackers and similar contrivances; but such acts are nevertheless wrongful. They are tolerated and not authorized, and those engaged in committing them assume the responsibility of all the bad consequences which ensue. Any injury to the persons of individuals, or any injury to property animate or inanimate, which results thereby, creates a liability on the part of the wrong-doer to compensate the sufferer. *Conklin* v. *Thompson*, 29 Barb. 218. And it is not contributory negligence on the part of the person injured to walk or ride upon a street or highway at the time that fire-works are exploding therein. Id. It is likewise held, if a person throws a lighted squib or other fire-work where it will be likely to cause damage to another, he is liable to any one ultimately injured by its explosion, although it may have been thrown about in self-defense by other persons for an indefinite number of times. *Scott* v. *Shepherd*, 2 W. Bl. 892; S. C., 3 Wils. 403. And see *Ricker* v. *Freeman*, 50 N. H. 420; S. C., 9 Am. Rep. 267; *Vandenburgh* v. *Truax*, 4 Denio, 464. The rule is, that whoever does a wrongful act is answerable for all the consequences that may ensue in the ordinary and natural course of events, though such consequences be immediately and directly brought about by intervening causes, if those intervening causes

were set in motion by the original wrong-doer. *Baltimore, etc., R. R. Co.* v. *Reaney*, 42 Md. 117.

One owning a saw-mill, and carrying on the business of sawing logs for others, owes a duty to his customers that the mill and its appliances shall be reasonably safe for those having a right or license to come into it for business purposes, and for damages arising from a neglect of this duty he is liable. *Ackart* v. *Lansing*, 48 How. (N. Y.) 374; S. C., 59 N. Y. (14 Sick.) 646. And see *ante*, 653, § 1. In England, under the Factory Act, 7 and 8 Vict., c. 15, § 21, it is a breach of duty for mill-owners to leave machinery unfenced, while it is in motion for manufacturing purposes. And all persons employed in mills, and not merely "children and young persons" are held to be entitled to the benefits of this statute. *Coe* v. *Platt*, 6 Exch. 752. See *Caswell* v. *Worth*, 5 El. & Bl. 849; *Doel* v. *Sheppard*, 5 id. 856; *Britton* v. *Great Western Cotton Co.*, L. R., 7 Exch. 130; S. C., 1 Eng. R. 381.

A mechanic employed to put up signs, on the second story of a building, on a thoroughfare of a populous city, made use for that purpose, in a windy day, of a swinging stage, that had no rim or other preventive of the sliding off of tools. A hammer fell on the head of a woman passing on the sidewalk beneath, and it was held that the mechanic was guilty of gross negligence. *Hunt* v. *Hoyt*, 20 Ill. 544. So, a driver of a railroad car, sitting on the car rail with his back to the horses, attending to a bird held in his hand, having the reins twisted about the brake, is guilty of gross negligence. *Mangam* v. *Brooklyn, etc., R. R. Co.*, 36 Barb. 230; S. C. affirmed, 38 N. Y. (11 Tiff.) 455.

The right of an individual to place a large number of diseased animals upon his own premises, although in immediate contiguity with a neighbor's stables containing his horses or other animals, is all that such individual can claim, and it is the only concession the law makes. And in the exercise of that right, he is bound to use due diligence to see that his neighbor is not injured by his negligence; and he has no right to suffer his diseased animals to go at large in the highway, or to water them at a public tank used for watering the animals of other persons, not diseased. *Mills* v. *New York, etc., R. R. Co.*, 2 Robt. (N. Y.) 326. And see, on this point, *Barnum* v. *Vandusen*, 16 Conn. 200; *Eaton* v. *Winnie*, 20 Mich. 156; S. C., 4 Am. Rep. 377. See *ante*, vol. I, 307.

Where the only available supply of water to throw upon a burning building was applied from a hose laid across a railroad, and the servants of the railroad company ran a train over the hose and severed it, thereby cutting off the water from the fire, which then consumed the building, the company was held liable for the damages caused by the

non-extinguishing of the fire. *Metallic Compression, etc., Co.* v. *Fitchburg R. R. Co.*, 109 Mass. 277; S. C., 12 Am. Rep. 689. In this case the servants of the company had notice about the hose, and might have stopped the train to permit the hose to be uncoupled. Id. But in *Mott* v. *Hudson River R. R. Co.*, 1 Robt. (N. Y.) 585, it was held that a railroad company was not liable for cutting the hose leading to a fire in the absence of any notice or warning to the train. See *Bosch* v. *B. & M. R. R. Co.*, 44 Iowa, 402.

ARTICLE III.

OF NEGLIGENCE NOT ACTIONABLE.

Section 1. In general. If an injury is occasioned by an unavoidable accident or inevitable casualty, no action will lie for it. See *ante*, Vol. 1, title *Accidents*. And a casualty, happening against the will and without the negligence or other default of the party, is as to him an "inevitable casualty." *Hodgson* v. *Dexter*, 1 Cranch (C. C.), 109.

But in order to prove that an accident was inevitable, it is not in every case sufficient to show that, under existing circumstances, it could not be avoided. It must likewise appear that the defendant was not in fault in bringing about any of those circumstances. In other words, it must appear that the accident was not occasioned, in any degree, either remotely or directly, by the want of such care or skill as the law holds every man bound to exercise. See *Dygert* v. *Bradley*, 8 Wend. 469. Thus, where the defendant drove a young and spirited horse without a curb-chain, in consequence of which he was less easily managed, in this, there was negligence; in his alarm, the defendant pulled the wrong rein, and in this, there was want of skill. And on either or both grounds he was responsible for the consequences. *Wakeman* v. *Robinson*, 1 Bing. 212. But if the horse had been properly harnessed and skillfully managed, and the accident to the plaintiff had still occurred, it would have been held *inevitable*. Id. And see *Cotterill* v. *Starkey*, 8 Car. & P. 691; *Merritt* v. *Earle*, 29 N. Y. (2 Tiff.) 115.

No one has a right of action arising out of negligence who has not been thereby injured. See *Bellefontaine, etc., R. R. Co.* v. *Bailey*, 11 Ohio St. 333. And negligence to be *actionable* must be the proximate cause of the injury sustained. See *Ryan* v. *New York Central R. R. Co.*, 35 N. Y. (8 Tiff.) 210; *George* v. *Smith*, 6 Jones' (N. C.) L. 273; *Lockhart* v. *Lichtenthaler*, 46 Penn. St. 151. The general rule is that a man is answerable for the consequences of a fault which

are natural and probable. Or, if one be engaged in an act which the circumstances indicate may be dangerous to others, and the event whose concurrence is necessary to make the act injurious can be readily seen as likely to occur under these circumstances, the defendant is liable if he does not take all the care which prudence would suggest to avoid the injury. *McGrew* v. *Stone*, 53 Penn. St. 436. And see *Greenland* v. *Chaplin*, 5 Exch. 243; *Harrison* v. *Berkley*, 1 Strobh. (S. C.) 525; *Bellefontaine, etc., R. R. Co.* v. *Snyder*, 18 Ohio St. 399; *Fairbanks* v. *Kerr*, 70 Penn. St. 86; S. C., 10 Am. Rep. 664. The injury will not be considered too remote if according to the usual experience of mankind the result ought to have been apprehended. *Lane* v. *Atlantic Works*, 111 Mass. 136; *Milwaukee, etc., Railway Co.* v. *Kellogg*, 4 Otto (94 U. S.), 469. And it is held that one injured by the negligence of another may recover for the natural and probable consequences thereof, although the injury, in the precise form in which it resulted, was not foreseen. *Hill* v. *Winsor*, 118 Mass. 251.

ARTICLE IV.

WHO MAY SUE FOR.

Section 1. In general. A person directly injured by negligence is, of course, a proper plaintiff. But a person *indirectly* injured by the negligence of another has a cause of action therefor, provided the injury be a proximate result of the defendant's fault. Thus, a master may recover damages for a tort which deprives him of the labor of his servant (*Woodward* v. *Washburn*, 3 Denio, 369. See *ante*, title *Master* and *Servant*); upon the same ground, a parent may recover for an injury to his child (*Pennsylvania R. R. Co.* v. *Kelly*, 31 Penn. St. 372), and a bailee for reward may maintain an action in his own name for the consequent loss of his hire. *McGill* v. *Monette*, 37 Ala. 49.

It is, however, not every one who suffers a loss from the negligence of another that can maintain a suit on such ground. The limit of the doctrine of actionable negligence is that the person occasioning the loss must owe a duty, arising from contract or otherwise, to the person sustaining such loss. Such a restriction on the right to sue for a want of care in the exercise of employments, or the transaction of business, is plainly necessary to restrain the remedy from being pushed to an impracticable extreme. *Kahl* v. *Love*, 37 N. J. Law, 5; *Fairmount etc., Railway Co.* v. *Stutler*, 54 Penn. St. 375. It has been accordingly held that one who sells a defective article to be used for a particular purpose, for which it is not fit, is not, in the absence of fraud, liable for an injury caused to a third person, by some defect in the con-

struction of such article. *Longmeid* v. *Holliday*, 6 Exch. 761. See *George* v. *Skivington*, L. R., 5 Exch. 1. So, a person employed to hang a chandelier in a public house is not liable to a guest of the house injured by the fall of the chandelier through defects in his work. *Collis* v. *Selden*, L. R., 3 C. P. 495. And one employed to construct a coach who performs his work so badly that it is unable to sustain the ordinary jar of travel, is not liable to a stranger injured by its breaking down. *Winterbottom* v. *Wright*, 10 Mees. & W. 109. See, also, *Losee* v. *Clute*, 51 N. Y. (6 Sick.) 494; S. C., 10 Am. Rep. 623; *Loop* v. *Litchfield*, 42 N. Y. (3 Hand) 351; S. C., 1 Am. Rep. 543.

But a dealer in drugs and medicines, who carelessly labels a deadly poison as a harmless medicine, and sends it so labeled into market, is liable to all persons, who, without fault on their part, are injured by using it as such medicine in consequence of the false label. See *ante*, 681, art. 2, § 16. The liability of the dealer in such case arises, not out of any contract or direct privity between him and the person injured, but out of the duty which the law imposes upon him to avoid acts in their nature dangerous to the lives of others. He is liable, therefore, though the poisonous drug with such label may have passed through many intermediate sales before it reaches the hands of the person injured. *Thomas* v. *Winchester*, 6 N. Y. (2 Seld.) 397. And it is the general rule, that, where an act of negligence is eminently dangerous to the lives of others, the guilty party is liable to any person injured thereby, whether there exists any privity between them or not. Otherwise the negligent party is liable only to the person with whom he contracts. *Burke* v. *DeCastro, etc., Co.*, 11 Hun (N. Y.), 354. See, also, *Coughtry* v. *Globe Woolen Co.*, 56 N. Y. (11 Sick.) 124; S. C., 15 Am. Rep. 387; *Jaffe* v. *Harteau*, 56 N. Y. (11 Sick.) 398; S. C., 15 Am. Rep. 438. And where the owner of an instrument or piece of machinery not in its nature dangerous allows another person competent to manage it to take and use it, and while in the possession and use of the other it becomes defective and injures a third person, the owner is not liable, and the fact that the right to use it was given under a contract by which it was to be used in performing work for the owner upon his premises does not change his liability. *King* v. *New York Central, etc., R. R. Co.*, 66 N. Y. (21 Sick.) 181; 23 Am. Rep. 37.

A public officer or other person who takes upon himself a public employment is liable to third persons for any injury occasioned by his own personal negligence or default in the discharge of his duties (*Phillips* v. *Commonwealth*, 44 Penn. St. 197; *Sawyer* v. *Corse*, 17 Gratt. [Va.] 230); and he is likewise liable to third persons for any injury occasioned by the negligence or default of his private agent or servant

in the discharge of his official duties. Id. So, one who, by contract with the State, assumes the duties and is invested with the powers of a public officer, is liable to any individual who sustains special damage by a neglect properly to perform such duties. *Robinson* v. *Chamberlain*, 34 N. Y. (7 Tiff.) 389. And see *French* v. *Donaldson*, 57 N. Y. (12 Sick.) 496; *Jones* v. *New Haven*, 34 Conn. 1. See, also, tit. *Municipal Corporations.*

A reversioner has a right to sue for an injury done to the value of the inheritance, and may recover damages to the extent of the probable depreciation. *Jesser* v. *Gifford*, 4 Burr. 2141. And building a roof with eaves which discharge rainwater by a spout upon the reversioner's land, is held to be a permanent injury within this rule. *Tucker* v. *Newman*, 11 Ad. & El. 40. So is an excavation, causing the soil to fall away. *Raine* v. *Alderson*, 4 Bing. N. C. 702; S. C., 6 Scott, 691. But a reversioner cannot maintain an action for a mere entry upon his land held by a tenant on lease, if no injury is done to the land itself, although the entry was made for the purpose of claiming title. *Baxter* v. *Taylor*, 4 Barn. & Ad. 72. Nor can a reversioner maintain an action for the nuisance of perpetual hammering in a railway company's workshop adjoining his house, although such nuisance is morally certain to continue. *Mumford* v. *Oxford, etc., Railway Co.*, 1 Hurlst. & N. 34; S. C., 36 Eng. L. & Eq. 580.

The owner of personal property hired out may sue for an injury to his reversionary interest as in the case of real property. *Hawkins* v. *Phythian*, 8 B. Monr. (Ky.) 515. But no action will lie by the holder of a mortgage against another for a mere negligent injury to the mortgaged premises, by which the plaintiff has lost his security (*Gardner* v. *Heartt*, 3 Denio, 232); though a mortgagee may sue for a conversion of the mortgaged property (*Burton* v. *Tannehill*, 6 Blackf. [Ind.] 470; *Bellune* v. *Wallace*, 2 Rich. [S. C.] L. 80); or for a trespass thereon. *Page* v. *Robinson*, 10 Cush. 99.

§ 2. **Illustrations.** Evidence tending to show that a plaintiff was injured by a board or plank falling from the defendant's premises is held to be sufficient, *prima facie*, to charge the defendant with negligence. *Clare* v. *National City Bank*, 1 Sweeny (N. Y.), 539. And where the defendant dug a ditch across a public sidewalk and allowed it to remain open at night with no provision for warning or protecting travelers, it was held that negligence was established as a matter of law. *Sexton* v. *Zett*, 44 N. Y. (5 Hand) 430. But to leave a horse unfastened upon the highway is not necessarily negligence. And whether it is or not must be determined by considering the temper of

the horse, and the particular circumstances under which he was left. *Griggs* v. *Fleckenstein*, 14 Minn. 81.

The fact that a ministerial officer has a discretion in regard to the mode of discharging a duty imperatively imposed on him by law does not entitle him to the immunity of a judicial officer, and if he improperly discharge such duties, he is liable to any person injured thereby. *Hicks* v. *Dorn*, 42 N. Y. (3 Hand) 47; S. C., 9 Abb. (N. S.) 47; affirming S. C., 1 Lans. 81; S. C., 54 Barb. 172. And see *Harmony* v. *Mitchell*, 13 How. (U. S.) 115.

The plaintiff, while driving in a portion of a street occupied by the defendant's railway tracks, was injured because of an excavation between the tracks. The excavation was made by an adjoining property owner, who had notified the defendant of his intention to excavate, whereupon the defendant bridged the excavation over, so that horses could pass. The defendant had agreed with the city "to pave the streets, in and about the rails, in a permanent manner, and keep the same in repair," and it was held that the contract made by the city inured to the benefit of the plaintiff, and that he was entitled to enforce it. *McMahon* v. *Second Avenue R. R. Co.*, 11 Hun (N. Y.), 347. This decision is based upon the principle that where one contracts with a municipal corporation to keep any portion of the streets in repair, he, in effect, contracts to perform that duty to the public in the place and stead of the municipality. See *City of Brooklyn* v. *Brooklyn City R. R. Co.*, 47 N. Y. (2 Sick.) 475; S. C., 7 Am. Rep. 469.

A mail carrier is the private agent of the contractor for carrying the mail, and the contractor is liable to third persons for any injury sustained through the negligence or default of such agent in the performance of his duties. *Sawyer* v. *Corse*, 17 Gratt. (Va.) 230.

Where a highway commissioner has received notice of the unsafe character of a bridge in his town, a year before an alleged injury has been sustained by reason of its defects, and has negligently omitted to cause it to be repaired, he is guilty of a wrong rendering him liable for all its consequences to those who might be injured by it. *Lament* v. *Haight*, 44 How. (N. Y.) 1.

ARTICLE V.

WHO MAY BE SUED FOR.

Section 1. In general. Infants and others incapable of contracting cannot be held liable for mere neglect to perform their contracts. But in an action *ex delicto*, for an injury occasioned by the wrongful act of

the defendant, the infancy of the defendant is no protection. He is as fully liable for the damages sustained as if he were of full age. *Conklin* v. *Thompson*, 29 Barb. 218; *Burnard* v. *Haggis*, 14 C. B. (N. S.) 45. And the rule is the same as to persons of unsound mind. See *Bullock* v. *Babcock*, 3 Wend. 391; *Williams* v. *Cameron*, 26 Barb. 172.

Where a party sustains an injury from the concurring negligence of several he may recover therefor against all or either of them. *Guille* v. *Swan*, 19 Johns. 381; *Barrett* v. *Third Avenue R. R. Co.*, 45 N. Y. (6 Hand) 628. And see *Pollett* v. *Long*, 56 N. Y. (11 Sick.) 200; *Lake* v. *Milliken*, 62 Me. 240; S. C., 16 Am. Rep. 456. Thus, a passenger injured by a collision resulting from the concurrent negligence of two railway companies may maintain a joint action against both. *Colegrove* v. *New York, etc., R. R. Cos.*, 20 N. Y. (6 Smith) 492. And the owners of a party-wall may be jointly sued for injuries sustained in consequence of its falling, through decay and want of repair. *Klauder* v. *McGrath*, 35 Penn. St. 128. So, in a case where the master is liable for the tortious negligence of his servant, the latter is jointly liable with him. *Phelps* v. *Wait*, 30 N. Y. (3 Tiff.) 78; *Fort* v. *Whipple*, 11 Hun (N. Y.), 586; *Wright* v. *Compton*, 53 Ind. 337.

As to the liability of masters for the acts of their servants, see *ante*, tit. *Master and Servant*. As to the liability of masters to their servants for negligence of fellow-servant, etc., see id.

§ 2. **Illustrations.** A licensed public carman, who carries on business on his own account, with his own capital, and his own wagons, horses, and servants, does not stand in the relation of servant to one who employs him to carry merchandise at an agreed price per package, so as to make the latter liable for the negligence of the servants of such carman. *McMullen* v. *Hoyt*, 2 Daly (N. Y.), 271; *DeForest* v. *Wright*, 2 Mich. 368.

One who superintends, although gratuitously and not under any contract, work done on the land of another, and through whose negligence, as well as that of such other, damage is done to a third person by the work, is liable jointly with the other person therefor. *Hawkesworth* v. *Thompson*, 98 Mass. 77. And if one person commits an unlawful act under the direction of another, that fact will not shield him from responsibility, but both are equally liable to the injured party. *Johnson* v. *Barber*, 5 Gilm. (Ill.) 425.

As against a private corporation obtaining authority to use the streets of a city in an extraordinary manner for its own private purposes and profit, the owner of a lot of ground with a building thereon, bounding on a street, is entitled to the natural support which the bed of the

street may afford to the foundation of his house. And notwithstanding authority may have been obtained both from the city and the State legislature, to make the extraordinary use of the street, yet that authority must be exercised at the peril of the party to whom it is delegated; and if any injury accrues to private property in the exercise of the power, the party producing it must be held liable. And such liability arises even though the injury is the natural or inevitable result or consequence of the act authorized to be done. *Baltimore, etc., R. R. Co.* v. *Reaney*, 42 Md. 117.

It has been held that the owner of land with an unsafe building upon it is liable for injuries done by the falling of the building, to the property of an occupant of adjoining land, notwithstanding the former had leased the premises to another person, reserving rent, but covenanting to repair. *Benson* v. *Suarez*, 43 Barb. 408; S. C., 19 Abb. Pr. 61; 28 How. 511. It has likewise been held, that one who reserves a right of possession and use in a pier, though he has parted with the title, is still liable for injuries caused by its bad condition. *Cannavan* v. *Conklin*, 1 Daly (N. Y.), 509; S. C., 1 Abb. Pr. (N. S.) 271. And see *Anderson* v. *Dickie*, 26 How. (N. Y.) 105. But if premises are in good repair when demised but afterward became ruinous and dangerous, the landlord is not responsible therefor either to the occupant or the public, during the continuance of the lease, unless he has expressly agreed to repair or has renewed the lease after the need of repair has shown itself; and this rule applies to a lessee out of possession who has sublet to another who is in possession. *Clancy* v. *Byrne*, 56 N. Y. (11 Sick.) 129; S C., 15 Am. Rep. 391. Such a lessee, therefore, is not liable for an injury to the property of a person lawfully upon the premises with his property, resulting from a neglect to keep them in repair; and this is so although, by his covenant with his landord, he is bound to make all ordinary repairs. The covenant does not give a right of action to or impose a liability in favor of a stranger. Id.; *Swords* v. *Edgar*, 59 N. Y. (14 Sick) 28; S. C., 17 Am. Rep. 295. And see *Todd* v. *Flight*, 9 C. B. (N. S.) 377; *Rich* v. *Basterfield*, 4 C. B. 783; 56 Eng. Com. L. & Eq. 783; *Tollit* v. *Sherstone*, 5 Mees. & W. 283; *ante*, 691, art. 2, § 18.

Neither a natural nor an artificial person is liable for the acts or negligence of another, unless the relation of master and servant or principal and agent exists between them. *Reed* v. *Alleghany City*, 79 Penn. St. 300; *McGuire* v. *Grant*, 1 Dutch. (N. J.) 356. The distinction on which all the cases turn is, that if the person employed to do the work carries on an independent employment, and acts in pursuance of a contract with his employer by which he has agreed to do the work

on certain specified terms, in a particular manner and for a specified price, then the employer is not liable. The relation of master and servant does not subsist between the parties, but only that of contractor and contractee. *Brackett* v. *Lubke*, 4 Allen, 138; *Robinson* v. *Webb*, 11 Bush (Ky.), 464. And where work is being done under contract, if there is any negligence, the contractors, or those employed by them are alone responsible. Id.; *Gardner* v. *Bennett*, 6 Jones & Sp. (N. Y.) 197. Thus, where a city employed a contractor to grade a street, and in performing his contract he threw dirt, stone, etc., on a lot abutting the street, it was held that the city was not liable to the lot-holder for the injury. *Reed* v. *Alleghany City*, 79 Penn. St. 300. See, also, *Wray* v. *Evans*, 80 id. 102. And the rule was applied where a house, in being raised up for an addition beneath, fell upon the house of an adjoining owner. *Conners* v. *Hennessey*, 112 Mass. 96. And see *Wood* v. *School District*, 44 Iowa, 27. But, on the other hand, if work is done under a general employment, and it is to be performed for a reasonable compensation or for a stipulated price, the employer remains liable, because he retains the right and power of directing and controlling the time and manner of executing the work, or of refraining from doing it, if he deems it necessary or expedient. Id.; *Forsyth* v. *Hooper*, 11 Allen, 419. And see *ante*, tit. *Master and Servant.* So, if A contract with B to do the carpenter work of a building at a fixed price, and to superintend the other work on the building, employing the hands and certifying the bills to B, who pays them, and A is guilty of negligence in not sufficiently guarding a pit or vault, opened in the sidewalk of the premises on which the building is erected, B will be responsible for damage sustained by a person falling into the opening, in consequence of such negligence. If, however, the negligence had been that of the carpenters, working under A, the rule of responsibility would have been different, and A would have been held liable. *Samyn* v. *McClosky*, 2 Ohio St. 536. See *Clare* v. *National City Bank*, 8 Jones & Sp. (N. Y.) 104.

A tenant does not lose possession in any sense that would impair his own rights, merely because a person enters under the direction of the landlord to make repairs or improvements; and if, during the progress of such repairs or improvements, the tenant receives personal injuries by reason of the negligent manner in which they were being made, the party whose negligence occasioned the injury must respond in damages. *Lamparter* v. *Wallbaum*, 45 Ill. 444. And if an employee of such tenant, while in the line of his duty as such, receives injuries from such negligence on the part of the person doing the work, the latter must respond to him also in damages. Id.

The owner of a building, to the chimney of which a gas company has, without the owner's consent, so affixed a wire as to render the chimney unsafe, and ultimately to cause its fall upon a passer-by, may be liable for the damages so caused; and if, when so liable, he pays the damage, he has an action against the company for indemnity. *Gray* v. *Boston Gas-Light Co.*, 114 Mass. 149; S. C., 19 Am. Rep. 324.

Where a servant of a mining company was killed by the falling of a rock from the roof of a common gangway in a coal mine, and it was sought to charge the company with negligence in not keeping the roof in a safe condition, it was held that notice to the superintendent, of the dangerous situation of the roof, was notice to the company; and that, if this was long enough before the accident to have given time to repair the same, was sufficient to fix negligence upon the company. *Quincy Coal Co.* v. *Hood*, 77 Ill. 68. See *Deppe* v. *Chicago, etc., R. R. Co.*, 38 Iowa, 592.

ARTICLE VI.

DAMAGES AS A REMEDY.

Section 1. In general. See, on this subject, *ante*, Vol. 2, 440, *et seq.* As a general rule, a person is answerable for the consequences of his fault only so far as they are natural and proximate, and may, therefore, be foreseen by ordinary forecaste; and not for those arising from a conjunction of his fault with circumstances of an extraordinary nature. *Fairbanks* v. *Kerr*, 70 Penn. St. 86; 10 Am. Rep. 664. And see *Cuff* v. *Newark, etc., R. R. Co.*, 35 N. J. Law, 17; 10 Am. Rep. 205; *Pollett* v. *Long*, 56 N. Y. (11 Sick.) 200. It is frequently difficult to determine the amount of damage sustained; and the rule is, that where a wrong has been committed, the wrong-doer must suffer from the impossibility of accurately ascertaining the amount of damage. If, therefore, the evidence seems equally balanced between two or more amounts, he must pay the larger sum. *Leeds* v. *Amherst*, 20 Beav. 239.

A recovery is not confined to the amount of damages sustained previous to the commencement of the action, but it may also include damages suffered up to the verdict (see *Dailey* v. *Dismal Swamp Canal Co.*, 2 Ired. [N. C.] L. 222), and those which it is reasonably certain that the plaintiff will suffer in the future. *Peoria Bridge Association* v. *Loomis*, 20 Ill. 236; *Kerr* v. *Forgue*, 54 id. 482; S. C., 5 Am. Rep. 146; *Curtis* v. *Rochester, etc., R. R. Co.*, 18 N. Y. (4 Smith) 534. But an injured party is not entitled to recover for damages which he might have avoided by the use of slight care and diligence, after becom-

ing aware of the injury complained of (*Worth* v. *Edmonds*, 52 Barb. 40; *Illinois, etc., R. R. Co.* v. *Finnigan*, 21 Ill. 646); nor for damages which, at a trifling expense or by reasonable exertions, he might have prevented. *Douglas* v. *Stephens*, 18 Mo. 362. And it has been held that the plaintiff cannot recover for damage which he might have avoided by the use of *ordinary* care and diligence. *State* v. *Powell*, 44 Mo. 436. And see *Sherman* v. *Fall River Iron Works*, 2 Allen, 524. But see *Chase* v. *New York, etc., R. R. Co.*, 24 Barb. 273; *Lawrence* v. *Housatonic R. R. Co.*, 29 Conn. 390. See, as to allowance for the plaintiff's loss of profits, *ante*, Vol. 2, 443, 469.

The rule of damages generally adopted in cases of negligent injury to real property is to allow the difference between the value of the plaintiff's premises before the injury happened, and the value immediately after the injury, taking into account only the damages which had resulted from the defendant's acts. *Chase* v. *New York, etc., R. R. Co.*, 24 Barb. 273; *McGuire* v. *Grant*, 1 Dutch. (N. J.) 356. The time of estimating the damage is when the injury is complete. *Schuylkill Navigation Co.* v. *Farr*, 4 Watts & Serg. 362. The rule as stated is not, however, universally applied, and it is held, that if the thing destroyed, although it is part of the realty, has a value which can be accurately measured and ascertained without reference to the soil in which it stands, or out of which it grows, the recovery must be for the value of the thing thus destroyed, and not for the difference in the value of the land before and after such destruction. *Whitbeck* v. *New York Central R. R. Co.*, 36 Barb. 644. And see *Richardson* v. *Northrup*, 66 id. 85; *Stanton* v. *Pritchard*, 4 Hun (N. Y.), 266; *Winchester* v. *Craig*, 33 Mich. 205; *Chicago, etc., R. R. Co.* v. *Ward*, 16 Ill. 522. To ascertain the damages, in an action for injury to a well by rendering the water impure, the cost of furnishing water to the family, having regard to the quality and quantity, may be taken into account in the estimate, also the difference in value of the property, owing to the erection of gas or other offensive structures in its vicinity. *Ottawa Gas-Light Co.* v. *Graham*, 28 Ill. 73.

In consequence of a railway embankment, the flood waters of a river were pent up and caused to flow over land of the plaintiff, doing injury to a certain amount. Had the embankment not been constructed, the waters would have flowed a different way, but would have reached the plaintiff's land, and would have done damage to a less amount, and it was held that the measure of damages recoverable by the plaintiff against the railway company was the difference only between the two amounts. *Workman* v. *Great Northern Railway Co.*, 32 L. J. (Q. B.) 279.

If goods are wholly lost or destroyed through negligence, the owner is entitled to recover their full value at the time of such loss or destruction. If the goods are partially injured, and the party seeks redress for the qualified damage, the measure should be in like proportion. *Smith* v. *Griffith*, 3 Hill, 333. And see *Edwards* v. *Beebe*, 48 Barb. 106; *Wise* v. *Freshly*, 3 McCord (S. C.), 547.

Where a telegraph company receives a message for transmission, without notice or information, either from the contents of the message or otherwise, of any fact indicating that extraordinary care or speed in its dispatch or delivery is important or expected, or that extraordinary or special damages will result from any neglect or want of care, or accuracy in transmitting it, the measure of damages for non-delivery is limited to such damage as results from the ordinary and obvious purpose of the contract. *Baldwin* v. *United States Tel. Co.*, 45 N. Y. (6 Hand) 744; S. C., 6 Am. Rep. 165; *United States Tel. Co.* v. *Gildersleve*, 29 Md. 232. In an action for the non-delivery of a telegram ordering goods, the plaintiff may recover the money paid for transmitting the message, any advance in freight, and any expenses incurred in consequence of the failure of the message, but he cannot recover contingent or anticipated profits. *West. Union Tel. Co.* v. *Graham*, 1 Col. T. 230; S. C., 9 Am. Rep. 136. And see *Squire* v. *West. Union Tel. Co.*, 98 Mass. 232; *Leonard* v. *New York Tel. Co.*, 41 N. Y. (2 Hand) 565; S. C., 1 Am. Rep. 446. For the non-delivery of a telegram directing the purchase of stock, the telegraph company was held liable for the difference between the price at the time the message ought to have been delivered, and the price at which the stock was purchased upon an order by mail. *United States Tel. Co.* v. *Wenger*, 55 Penn. St. 262. See *Rittenhouse* v. *Independent Line of Telegraph*, 44 N. Y. (5 Hand) 263; S. C., 4 Am. Rep. 673.

Where the amount which a telegraph company shall pay as a penalty for a failure to comply with requirements of law, is fixed by statute, the company cannot change the degree or measure of the statutory liability, by the adoption of rules and regulations. Nor will paying back the amount paid for sending a dispatch, and the acceptance of the same, unless it is agreed to be accepted in full of all that the party has a right to recover by virtue of the statute, bar an action for the full penalty. *Western Union Tel. Co.* v. *Buchanan*, 35 Ind. 429; 9 Am. Rep. 744.

The rule so carefully maintained and guarded in actions upon contracts, and for tortious injuries to property, is incapable of being applied where the injury is to the person, such injuries being without precise pecuniary measure. The law has accordingly, in cases of injury

to the person, committed the determination of the amount of damages to be awarded, to the experience and good sense of jurors. And when the verdict rendered by them may reasonably be presumed to have resulted from an honest and intelligent exercise of judgment on their part, the policy of the courts is, and necessarily must be, not to interfere with their conclusion. *Walker* v. *Erie Railway Co.*, 63 Barb. 260. See *Heil* v. *Glanding*, 42 Penn. St. 493. In an action for a negligent injury to the person, the plaintiff may recover for loss of time and expense incurred, for the pain and suffering undergone, and for permanent injuries sustained, impairing future usefulness. *Beardsley* v. *Swann*, 4 McLean (C. C.), 333; *Wade* v. *Leroy*, 20 How. (U. S.) 34; *Klein* v. *Jewett*, 26 N. J. Eq. 474; *Stockton* v. *Frey*, 4 Gill (Md.), 406; *Masters* v. *Warren*, 27 Conn. 293; *Pennsylvania, etc., Land Co.* v. *Graham*, 63 Penn. St. 290; S. C., 3 Am. Rep. 549; *Canning* v. *Williamstown*, 1 Cush. 451. It has, however, been held that the jury in estimating damages cannot consider the "character" of the plaintiff, nor his pain of mind, aside and distinct from his bodily suffering. *Johnson* v. *Wells*, 6 Nev. 224; S. C., 3 Am. Rep. 245. Nor are the damages to be estimated by, or proportioned to, the wealth of the defendant. *Moody* v. *Osgood*, 50 Barb. 628. And indirect proof of the defendant's wealth is just as inadmissible as direct proof, and for the same reasons. Id. So, in an action by a woman against a railway company for personal injuries, the death of her husband by the same cause, or the fact that she has children dependent upon her for support, is inadmissible in evidence to increase the damages. *Shaw* v. *Boston, etc., R. R. Co.*, 8 Gray, 45. See, also, *Stockton* v. *Frey*, 4 Gill (Md.), 406. And in an action to recover damages for personal injuries by which the plaintiff is prevented from transacting his accustomed business, where the business is of such a nature that the profits therein are uncertain, proof of his past profits is held to be incompetent. *Masterton* v. *Village of Mount Vernon*, 58 N. Y. (13 Sick.) 391. See *Walker* v. *Erie Railway Co.*, 63 Barb. 260; *McLaughlin* v. *Corry*, 77 Penn. St. 109; 18 Am. Rep. 432. But in an action against a physician for causing an injury to the wife by unskillful and careless treatment in delivering her of a child, damages may be given for the increased expense of employing another physician to effect a cure (*Leighton* v. *Sargent*, 31 N. H. 119); and also for the mental suffering of the wife caused by the destruction of the child. *Smith* v. *Overby*, 30 Ga. 241. See *ante*, Vol. 2, 444, *et seq.*

§ 2. **Exemplary damages.** See *ante*, Vol. 2, 446, *et seq.* In cases of simple negligence, the rule governing the measure of damages is to allow the actual damages. And it has been held that the allowance

of "smart money" in such cases is improper. *Moody* v. *McDonald*, 4 Cal. 297. It is, however, frequently said that juries are authorized to give exemplary damages in cases of gross negligence, as well as for forcible injuries; as where a stage coach proprietor employs a known drunkard as a driver, through whose negligence while intoxicated a passenger receives injury (*Sawyer* v. *Sauer*, 10 Kans. 466; *Frink* v. *Coe*, 4 Greene [Iowa], 555); or where a personal injury has been caused by the gross negligence of a railroad company in the management of its trains (*Hopkins* v. *Atlantic, etc., R. R. Co.*, 36 N. H. 9; *Milwaukee, etc., Railway Co.* v. *Arms*, 91 U. S. [1 Otto] 489); or, if the plaintiff prove gross negligence in the defendant's treatment of his disease. *Cochran* v. *Miller*, 13 Iowa, 128. And see *Kountz* v. *Brown*, 16 B. Monr. (Ky.) 577; *Vicksburg, etc., R. R. Co.* v. *Patton*, 31 Miss. 156. But although the jury are not restricted to a bare indemnification for the injury actually proved from the defendant's gross negligence, yet, under their legal discretion, the exemplary should bear some proportion to the real damage sustained. *Grant* v. *McDonogh*, 7 La. Ann. 447. See *Jackson* v. *Schmidt*, 14 id. 806; *Emblen* v. *Myers*, 6 Hurlst. & N. 54.

§ 3. **Discretion of jury.** See *ante*, Vol. 2, 477, *et seq.* See, also id., tit. *Damages.*

ARTICLE VII.

INJUNCTION AS A REMEDY.

Section 1. In general. See *ante*, Vol. 3, tit. *Injunctions.*

ARTICLE VIII.

DEFENSES.

Section 1. In general. The law affords a party a remedy by civil action to recover damages for an injury to his person or property, caused either directly or consequentially by the negligence, inadvertence, or want of proper precaution on the part of another, and the fact that the injury was *unintentional* is no defense to such an action. *Amick* v. *O'Hara*, 6 Blackf. (Ind.) 258. Nor is the *lawfulness* of the act from which the injury resulted any excuse for the negligence, unskillfulness, or reckless incaution of the party. *Tally* v. *Ayres*, 3 Sneed (Tenn.), 677. And see *Baltimore, etc., R. R. Co.* v. *Reaney*, 42 Md. 117. To constitute an available defense in such cases, it must appear that the injury was unavoidable, or the result of some superior agency, without the imputation of any degree of fault to the defend-

ant (*Tally* v. *Ayres*, 3 Sneed [Tenn.], 677; *Cotterill* v. *Starkey*, 8 Carr. & P. 691; *Merritt* v. *Earle*, 29 N. Y. [2 Tiff.] 115); or that the negligence of the plaintiff contributed to the injury. *Fleming* v. *Western Pacific R. R. Co.*, 49 Cal. 253.

§ 2. **Contributory negligence.** The rule very generally adopted by the courts is, that, whenever there is negligence on the part of the plaintiff, contributing directly, or as a proximate cause, to the occurrence from which the injury arises, such negligence will prevent the plaintiff from recovering, either at law or in equity. *Murphy* v. *Deane*, 101 Mass. 455; S. C., 3 Am. Rep. 390; *Johnson* v. *Tillson*, 36 Iowa, 89; *Cooper* v. *Central R. R. Co.*, 44 id. 134; *Schaabs* v. *Woodburn Sarven Wheel Co.*, 56 Mo. 173; *Lynam* v. *Phila., etc., R. R. Co.*, 4 Houst. (Del.) 583; *Grippen* v. *New York Central R. R. Co.*, 40 N. Y. (1 Hand) 34; *Bigelow* v. *Reed*, 51 Me. 325; *Delaware, etc., R. R. Co.* v. *Toffey*, 38 N. J. Law, 525; *Runyon* v. *Central R. R. Co.*, 1 Dutch. (N. J.) 556; *Ellis* v. *London, etc., Railway Co.*, 2 Hurlst. & N. 424; *Winship* v. *Enfield*, 42 N. H. 197; *Drake* v. *Philadelphia, etc., R. R. Co.*, 51 Penn. St. 240; *Stiles* v. *Geesey*, 71 id. 439; *Tuff* v. *Warman*, 5 C. B. (N. S.) 573; *Witherley* v. *Regent's Canal Co.*, 12 id. 2. But the rule adopted by the courts in Illinois, and in some of the other States is, that negligence resulting in injury is *comparative*, and it is not required that the plaintiff shall be free from all negligence himself, or that he shall exercise the highest possible degree of prudence and caution to entitle him to recover, if it appear that the defendant was guilty of a high degree of negligence. *Chicago, etc., R. R. Co.* v. *Pondrom*, 51 Ill. 333; S. C., 2 Am. Rep. 306; *Chicago, etc., R. R. Co.* v. *Hatch*, 79 id. 137; *Pacific R. R. Co.* v. *Houts*, 12 Kans. 328. And see *Kerwhaker* v. *Cleveland, etc., R. R. Co.*, 3 Ohio St. 172; *Lafayette, etc., R. R. Co.* v. *Adams*, 26 Ind. 76; *Stucke* v. *Milwaukee, etc., R. R. Co.*, 9 Wis. 202; *Klipper* v. *Coffey*, 44 Md. 117; *N. & C. R. R. Co.* v. *Carroll*, 6 Heisk. (Tenn.) 347.

In a recent case in Missouri, the rule is stated to be, that although the plaintiff may have failed to exercise ordinary care and diligence and such failure contributed in a remote degree to the injury, yet if the defendant was guilty of negligence which was the immediate cause of the injury, and with the exercise of ordinary prudence and care by him the injury could have been prevented, he is liable. But if the plaintiff could have avoided the injury by the exercise of ordinary care and prudence, the defendant is not liable. *Walsh* v. *Mississippi Valley Transp. Co.*, 52 Mo. 434. See, also, *Baltimore, etc., R. R. Co.* v. *Mulligan*, 45 Md. 486. So, it is held in California, that the rule releasing a defendant from responsibility for damages because of

the negligence of the plaintiff, is limited to cases where the act or omission of the plaintiff was the *proximate* cause of the injury. *Flynn* v. *San Francisco, etc., R. R. Co.*, 40 Cal. 14; S. C., 6 Am. Rep. 595; *Maumus* v. *Champion*, 40 Cal. 121. And see *Davies* v. *Mann*, 10 Mees. & W. 546; *Foster* v. *Holly*, 38 Ala. 76; *Beers* v. *Housatonic R. R. Co.*, 19 Conn. 566; *Louisville, etc., R. R. Co.* v. *Collins*, 2 Duv. (Ky.) 114; *Button* v. *Hudson River R. R. Co.*, 18 N. Y. (4 Smith) 248; *Newhouse* v. *Miller*, 35 Ind. 463.

The contributory negligence which excuses the defendant from liability for injury caused, in part at least, by his negligence, must be the *personal* act of the party injured, or of some one whose fault is imputable to him. The negligence of a mere stranger contributory to the injury furnishes no excuse for the negligence of the defendant, and no reason why he should not respond in damages. *Webster* v. *Hudson River R. R. Co.*, 38 N. Y. (11 Tiff.) 260; *Lockhart* v. *Lichtenthaler*, 46 Penn. St. 151; *Burrows* v. *March Gas Co.*, L. R., 5 Exch. 67. Thus, where a person who, through the negligence of another, has received an injury which, without a surgical operation, would cause his death, employs a competent and skillful surgeon, by whose mistake the operation is not successful, and the patient dies, the wrong-doer is not shielded from liability by the surgeon's error, and this, although the operation is the immediate cause of the death. *Sauter* v. *New York, etc., R. R. Co.*, 66 N. Y. (21 Sick.) 50; 23 Am. Rep. 18. Nor is the right of the plaintiff to recover affected by his having contributed to the injury by his conduct, unless he was at *fault* in so doing. *Western Union Tel. Co.* v. *Eyser*, 2 Col. T. 141. In other words, a party injured need not be a passive recipient of the injury in order to establish a right to recover of the wrong-doer for the injury. *City of Wyandotte* v. *White*, 13 Kan. 191. There is no rule of law which imposes it as a duty upon any one, over whom danger impends by the negligence of another, to incur greater danger by delaying his efforts to avoid it until its exact nature and measure are ascertained. If, therefore, the plaintiff, actuated by fears of apparent danger, was injured in his endeavors to avoid it, that will not of itself relieve the defendant from liability. *Coulter* v. *American Merchants' Union Ex. Co.*, 5 Lans. (N. Y.) 67; S. C., 56 N. Y. (11 Sick.) 585; *Southwestern Railway Co.* v. *Paulks*, 24 Ga. 356; *Walsh* v. *Mead*, 8 Hun (N. Y.), 387; *Larrabee* v. *Sewall*, 66 Me. 376.

It has been held in Massachusetts and in some of the other States that, in an action to recover for injuries caused by the defendant's negligence, the plaintiff must prove that he was free from contributory fault, or fail in his action. This rule is based upon the ground

that there can be no recovery unless two conditions concur, namely, negligence of the defendant, and freedom of the plaintiff from contributory fault, and that it is incumbent on the plaintiff to show the existence of both conditions. *Murphy* v. *Deane*, 101 Mass. 455; S. C., 3 Am. Rep. 390. And see *Owings* v. *Jones*, 9 Md. 108; *Park* v. *O'Brein*, 23 Conn. 339; *Dickey* v. *Maine Tel. Co.*, 43 Me. 492; *Walker* v. *Herron*, 22 Tex. 55; *Michigan Central R. R. Co.* v. *Coleman*, 28 Mich. 440; *Warner* v. *New York Central R. R. Co.*, 44 N. Y. (5 Hand) 465; *Robinson* v. *New York, etc., R. R. Co.*, 65 Barb. 146; *Pendleton, etc., R. R. Co.* v. *Stallman*, 22 Ohio St. 1; *Evansville, etc., R. R. Co.* v. *Hiatt*, 17 Ind. 102; *Galena, etc., R. R. Co.* v. *Fay*, 16 Ill. 558. In other States the rule is, that if the negligence of the plaintiff concurred in producing the injury complained of, that is purely matter of defense and hence the burden of proving it is upon the defendant. *Thompson* v. *North Missouri R. R. Co.*, 51 Mo. 190; S. C., 11 Am. Rep. 443; *Hoyt* v. *Hudson*, 41 Wis. 105; S. C., 22 Am. Rep. 714; *Railroad Company* v. *Gladmon*, 15 Wall. (U. S.) 401; *Robinson* v. *Western Pacific R. R. Co.*, 48 Cal. 409; *Paducah, etc., R. R. Co.* v. *Hoehl*, 12 Bush (Ky.), 41. And see *Johnson* v. *Hudson River R. R. Co.*, 5 Duer (N. Y.), 21. But if it appears from the plaintiff's own testimony it will defeat a recovery. *Hocum* v. *Weitherick*, 22 Minn. 152; *Brown* v. *Milwaukee, etc., R. R. Co.*, id. 165.

The rule of law in regard to the negligence of an adult and in regard to that of an infant ten years of age is materially different. By the adult there must be given that care and attention for his own protection that is ordinarily exercised by persons of intelligence and discretion. If he fails to give it, his injury is the result of his own folly and cannot be visited upon another. Of an infant of tender years, less discretion is required and the degree depends upon his age and knowledge. Of a child of three years of age, less caution would be required than of seven, and of a child of seven, less than of one of twelve or fifteen. The caution required is according to the maturity and capacity of the child, and this is to be determined in each case by the circumstances of that case. *Railroad Company* v. *Gladmon*, 15 Wall. 401. See, also, *Railroad Company* v. *Stout*, 17 id. 657; *Chicago, etc., R. R. Co.* v. *Becker*, 76 Ill. 25; *Birge* v. *Gardiner*, 19 Conn. 507; *Robinson* v. *Cone*, 22 Vt. 213; *Baltimore, etc., R. R. Co.* v. *Breinig*, 25 Md. 378; *Reynolds* v. *New York Central R. R. Co.*, 58 N. Y. (13 Sick.) 249; *North Penn. R. R. Co.* v. *Mahoney* 57 Penn. St. 187. This is in harmony with the well-established rule that persons in sudden emergencies and called to act under pecu-

liar circumstances are not held to the exercise of the same degree of caution as in other cases; and with another principle asserted by the courts, that carriers of persons for hire are called upon to care more tenderly and prudently for the aged, the infirm and the partially helpless than for the vigorous and healthy of their passengers. See *Thurber* v. *Harlem, etc., R. R. Co.*, 60 N. Y. (15 Sick.) 326, 336. And see also, *ante*, Vol. 2, tit. *Common Carriers.*

In England, and in those States of the Union where the doctrine of imputable negligence is recognized, the rule is, that a child of tender years and who is not *sui juris*, who is negligently suffered by his parents to run at large, and thereby is placed in the way of being harmed, cannot recover for injuries received through the negligence of others. The want of care and omission of duty of parents are regarded as contributory to the injury, and this neglect is imputed to the child and there is no redress for him. This want of care on the part of the parent or guardian furnishes the same answer to an action by the child as would the omission of proper care on the part of the plaintiff, in an action by an adult. *Waite* v. *Northeastern Railway Co.*, El. Bl. & El. 719; *Hartfield* v. *Roper*, 21 Wend. 615; *Wright* v. *Malden, etc., R. R. Co.*, 4 Allen, 283; *Lafayette, etc., R. R. Co.* v. *Huffman*, 28 Ind. 287. See *Karr* v. *Parks*, 40 Cal. 193. But in order to defeat the action there must be an omission of such care as persons of ordinary prudence exercise and deem adequate in the care of children. *O'Flaherty* v. *Union Railway Co.*, 45 Mo. 70; *Schmidt* v. *Milwaukie, etc., R. R. Co.*, 23 Wis. 186. And negligence upon the part of the parents is no defense where it appears that the child has not committed or omitted any act which would constitute contributory negligence in a person of years of discretion. Negligence can only be imputed to the child through the parents, but when the child has done no negligent act the conduct of the parents is immaterial. *McGarry* v. *Loomis*, 63 N. Y. (18 Sick.) 104; S. C., 20 Am. Rep. 510. See, also, *Lynch* v. *Smith*, 104 Mass. 52; S. C., 6 Am. Rep. 188; *Keefe* v. *Milwaukie, etc., R. R. Co.*, 21 Minn. 207; S. C., 18 Am. Rep. 393; *Kerr* v. *Forgue*, 54 Ill. 482; S. C., 5 Am. Rep. 146; *Walters* v. *C., R. I. & P. R. R. Co.*, 41 Iowa, 71. The fact, that a young child, who has parents and other guardians and protectors, is found alone and unwatched in the street, is presumptive evidence that he was so exposed voluntarily or negligently by his protectors, and that their negligence thus contributed to his injury. But the fact that the child is in the street alone, or in the way of a vehicle alone, is not conclusive that he is there by the negligence of those for whose care the law holds him responsible. It is a fact which admits of explanation, and notwith-

standing which, the question of negligence is open to inquiry. *Mangam* v. *Brooklyn R. R. Co.*, 38 N. Y. (11 Tiff.) 455; affirming S. C., 36 Barb. 230. And see *Fallon* v. *Central Park, etc., R. R. Co.*, 64 N. Y. (19 Sick.) 13; *St. Paul* v. *Kuby*, 8 Minn. 154; *Boland* v. *Missouri R. R. Co.*, 36 Mo. 484; *Barksdull* v. *New Orleans, etc., R. R. Co.*, 23 La. Ann. 180.

The doctrine of imputing to an infant the negligence of his adult custodian, for the purpose of defeating an action on behalf of the infant, for injuries caused by the defendant's negligence, is distinctly repudiated by the courts in some of the States, and it is held that such negligence is not to be considered in such an action. See *Daley* v. *Worcester, etc., R. R. Co.*, 26 Conn. 591; *Bellefontaine, etc., R. R. Co.* v. *Snyder*, 18 Ohio St. 399; *North Penn. R. R. Co.* v. *Mahoney*, 57 Penn. St. 187; *Whirley* v. *Whittemore*, 1 Head (Tenn.), 620; *Government Street R. R. Co.* v. *Hanlon*, 53 Ala. 70; *Norfork, etc., R. R. Co.* v. *Ormsby*, 27 Gratt. (Va.) 455. See *Philadelphia, etc., R. R. Co.* v. *Long*, 75 Penn. St. 257. But when the parent sues for the loss of services sustained by an injury to the child, then the contributory negligence of the actual plaintiff may be a bar. *Glassey* v. *Hestonville, etc., R. R. Co.*, 57 id. 172. See, also, *Louisville, etc., Canal Co.* v. *Murphy*, 9 Bush (Ky.), 522.

It has been held, in an action by the husband and wife for an injury to the wife on the highway while riding with the husband, that any want of ordinary care on the part of the husband was attributable to the wife in the same degree as if she were acting wholly for herself, and would be a bar to a recovery. *Carlisle* v. *Sheldon*, 38 Vt. 440. But as a general rule, a person who is injured by the negligence of another is not responsible for any contributory negligence of a third person, with whom he happens to be riding, at the time, over whom, or whose conduct, he has no control. Thus, one who has accepted an invitation to take a ride with a person in every way competent and fit to manage a horse, is not chargeable with his negligence, and contributory negligence upon his part is no defense to an action against a railroad company for injuries resulting from a collision. *Robinson* v. *New York, etc., R. R. Co.*, 66 N. Y. (21 Sick.) 11; 23 Am. Rep. 1. See, also, *Griggs* v. *Fleckenstein*, 14 Minn. 81.

Some recent decisions in illustration of the rules as to contributory negligence will be given in this connection, reserving a full discussion of the subject for a more appropriate place under the general head of defenses.

The fact that a party, while suffering an injury to his person or property from the negligence of another, was doing an unlawful act,

as for instance, driving cattle to market on Sunday, will not prevent his recovering therefor, unless the act would naturally tend to produce the injury. *Sutton* v. *Wauwatosa*, 29 Wis. 21; S. C., 9 Am. Rep. 534. But see *contra*, *Jones* v. *Andover*, 10 Allen, 18; *Smith* v. *Boston, etc., R. R.*, 120 Mass. 490; S. C., 21 Am. Rep. 538; *Cratty* v. *City of Bangor*, 57 Me. 423; S. C., 2 Am. Rep. 56; *Johnson* v. *Irasburgh*, 47 Vt. 28; S. C., 19 Am. Rep. 111. So, where the plaintiff's team, while standing in a public street, in a manner prohibited by a city ordinance, was negligently driven against and injured by the defendant, it was held that the fact the plaintiff was, at the time, violating the law did not constitute contributory negligence. *Steele* v. *Burkhardt*, 104 Mass. 59; S. C., 6 Am. Rep. 191. And see *Damon* v. *Inhabitants of Scituate*, 119 Mass. 66; S. C., 20 Am. Rep. 315; *McClary* v. *Lowell*, 44 Vt. 116; S. C., 8 Am. Rep. 366; *O'Connell* v. *City of Lewiston*, 65 Me. 34; S. C., 20 Am. Rep. 673.

At common law, the fact that a street railway passenger voluntarily puts himself on the front platform of the car, when there is room inside, will not absolve the railway company from liability for injuries there received by him. *Burns* v. *Bellefontaine R. R. Co.*, 50 Mo. 139. And see *Clark* v. *Eighth Avenue R. R. Co.*, 32 Barb. 657; S. C. affirmed, 36 N. Y. (9 Tiff.) 135; *Ginna* v. *Second Avenue R. R. Co.*, 67 N. Y. (22 Sick.) 596. Nor is it negligence *per se* for one riding upon the platform of the car to omit to take hold of the iron bar or rail to avoid being thrown from the platform. Id. But when an employee leaves his post of duty and goes to a place of danger, knowing it to be such, and there receives an injury, he is guilty of contributory negligence. *Sammon* v. *New York, etc., R. R. Co.*, 6 Jones & Sp. (N. Y.) 414; S. C. affirmed, 62 N. Y. (17 Sick.) 251. So, one who attempts to cross a swollen stream, the bridge over it being out of repair, when it is apparent that the stream is swollen and dangerous to cross, is guilty of contributory negligence, and in case of injury he cannot recover damages for failure to repair the bridge. *Jackson* v. *Commissioners, etc.*, 76 N. C. 282. See, also, *Folsom* v. *Underhill*, 36 Vt. 580. So, if the driver of a horse and vehicle approaching a defect in a highway loses control over the horse, by reason of the latter throwing his tail over the rein, and this fact contributes to an accident when the defective spot is reached, the town is not liable for the injury. *Fogg* v. *Nahant*, 106 Mass. 278. And see *Winship* v. *Enfield*, 42 N. H. 197.

Where a person returns to the owner a gun which he has heavily loaded for the purpose of having the latter kicked by its discharge, and such owner finds out its condition, but nevertheless discharges it,

the act of the borrower is not the proximate cause of the injury resulting to the owner from such discharge. *Smith* v. *Thomas*, 23 Ind. 69.

It is held in Oregon that *some* negligence on the part of one in fastening his boats in an exposed position does not excuse *gross* negligence in another in running into and destroying them. *Bequette* v. *Peoples' Transp. Co.*, 2 Oreg. 200.

In an action to recover damages for personal injuries caused by the negligence of the defendant, the mere fact of intoxication will not establish want of ordinary care. The jury must determine whether the intoxication contributed to the injury; if it did not, it is of no importance. *Healy* v. *Mayor*, 3 Hun (N. Y.), 708; S. C., 6 Sup. Ct. (T. & C.) 92; *Robinson* v. *Pioche*, 5 Cal. 460; *Stuart* v. *Machias Port*, 48 Me. 477; *Ditchett* v. *Spuyten Duyvil, etc., R. R. Co.*, 5 Hun (N. Y.), 165.

Where a wife knows the fact that her husband has purchased a jug of whisky, and is drinking immoderately, and has it in her power to prevent him from drinking in such quantity as to injure him, by breaking the jug, or pouring out its contents, and is not prevented from doing so through fear, but permits him to use it in great excess, from which death ensues, she must be considered as a willing party to his conduct, and instrumental in bringing the loss upon herself. She cannot, therefore, recover damages in an action under the statute, for causing the death of her husband by selling him intoxicating liquor. *Reget* v. *Bell*, 77 Ill. 593.

One who had supervised the placing of a telegraph pole four or five feet into the earth and knew of a subsequent grading down, leaving it only a foot therein, was held to be guilty of such contributory negligence in climbing it with spikes to detach the wires, that his widow could not recover for his being killed by its fall. *Matthews* v. *St. Louis Grain Elevator Co.*, 59 Mo. 474.

A passenger who is lawfully upon a railroad train and has paid his fare has the right to offer such resistance to any attempt on the part of the conductor to remove him therefrom as may be necessary to prevent his being ejected. And if, in consequence of his resistance, extraordinary force becomes necessary and is used to remove him, and he is injured thereby, he can recover of the company for such injury. *English* v. *Delaware and Hudson Canal Co.*, 66 N. Y. (21 Sick.) 454; 23 Am. Rep. 69. The principle of the plaintiff's own negligence depriving him of his right of action does not apply to such a case. Id.; *Sanford* v. *Eighth Avenue R. R. Co.*, 23 N. Y. (9 Smith) 343.

So, a defendant, by whose negligence the property of another has been injured, cannot excuse his negligence by showing that the plain-

tiff's property was placed where it received the injury by an act of trespass on the part of the plaintiff. *Brown* v. *Lynn*, 31 Penn. St. 510. And mere want of reasonable care in placing or securing his property on the part of the plaintiff is no defense to an action for injuries caused by the breaking away of the defendant's dam. *Fraler* v. *Sears, etc., Co.*, 12 Cal. 555.

If a person places cord-wood upon the right of way and near the track of a railroad, under an agreement, express or implied, with the company so to do, he does not thereby contribute to an injury caused by the destruction of the wood by fire communicated from a passing locomotive. *Pittsburg, etc., R. R. Co.* v. *Nelson*, 51 Ind. 150.

A person employed to work with or around dangerous machinery is bound to exercise his thinking faculties and to give careful attention as to how he passes around it; and if he fails to do so, and is injured in consequence, he is guilty of contributory negligence, which will prevent his recovery for such injury. *Stone* v. *Oregon City Manuf. Co.*, 4 Oreg. 52. And see tit. *Master and Servant.*

CHAPTER CII.

NUISANCES.

ARTICLE I.

OF NUISANCES IN GENERAL.

Section 1. Nature and definition. It is said to be impracticable to give a precise, technical definition of what constitutes a nuisance at common law, and that the only accurate method of ascertaining the legal meaning of the term is, to examine decided cases adjudged to be, or not to be, nuisances. *Norcross* v. *Thoms*, 51 Me. 503. A nuisance is, however, generally defined to signify any thing that *unlawfully* worketh hurt, inconvenience, or damage to another. See 2 Broom. & Had. Com. (Wait's Ed.) 219; 2 Bouv. Dict. 245; *Commonwealth* v. *Old Colony, etc., R. R. Co.*, 14 Gray, 93; *Coker* v. *Birge*, 9 Ga. 425. The statute of Indiana declares to be a nuisance, "whatever is injurious to health, or indecent, or offensive to the senses, or an obstruction to the free use of property, so as essentially to interfere with the comfortable enjoyment of life or property," and this, perhaps, is as accurate a definition of the term "nuisance," as understood at common law, as can be found elsewhere. *State* v. *Taylor*, 29 Ind. 517; *Hackney* v. *State*, 8 id. 494. And see *Regina* v. *Gray*, 4 Fost. & Fin. 73; *State* v. *Purse*, 4 McCord (S. C.), 472; *Nolan* v. *Mayor, etc.*, 4 Yerg. (Tenn.) 163; *Pickard* v. *Collins*, 23 Barb. 444, 453.

It is a general doctrine that every man has the right to regulate, improve and control his own property, to make such erections as his own judgment, taste or interest may suggest, and to be master of his own without dictation or interference by his neighbors. *Barnes* v. *Hathorn*, 54 Me. 124. On the other hand, if he makes an unreasonable, unwarrantable or unlawful use of his own property, so as to produce material annoyance, inconvenience, discomfort or hurt to his neighbor, he will be guilty of a nuisance to his neighbor and the law will hold him responsible for the consequent damage. Id.; *Butterfield* v. *Klaber*, 52 How. (N. Y.) 255. The great difficulty lies in drawing the line in particular cases so as to recognize and enforce both of these rules within reasonable limitations; since it is well settled that

a use of property in one locality and under some circumstances may be lawful and reasonable, which, under other circumstances, would be unlawful, unreasonable and a nuisance. See *Rhodes* v. *Dunbar*, 57 Penn. St. 274; *Mulligan* v. *Elias*, 12 Abb. (N. S., N. Y.) 259; *Columbus, etc., Gas Co.* v. *Freeland*, 12 Ohio St. 392; *St. Helen's Smelting Co.* v. *Tipping*, L. R., 11 H. L. Cas. 642. It may, however, be regarded as fairly settled, that in order to create a nuisance from the use of property, the use must be such as to produce a tangible and appreciable injury to neighboring property, or such as to render its enjoyment specially uncomfortable or inconvenient. Id.; *Ryan* v. *Copes*, 11 Rich. (S. C.) L. 217; *Campbell* v. *Seaman*, 63 N. Y. (18 Sick.) 568; S. C., 20 Am. Rep. 567; *Salvin* v. *North Brancepeth Coal Co.*, L. R., 9 Ch. App. Cas. 705; S. C., 10 Eng. Rep. 685; *Scott* v. *Firth*, 4 Fost. & F. 349; *Sparhawk* v. *Union R. R. Co.*, 54 Penn. St. 401; *Wahle* v. *Reinbeck*, 76 Ill. 322. But it has been held that one may not, with impunity, invade the premises of another by any thing in the shape of a nuisance, because the damage may not be *appreciable*, and that the law does not justify or excuse any such invasion, be it ever so small, and allows the recovery of nominal damages at least, as evidence of the plaintiff's right. *Casebeer* v. *Mowry*, 55 Penn. St. 419. See, also, *Barker* v. *Green*, 2 Bing. 317; *Fry* v. *Prentice*, 14 L. J. (N. S.) 298.

A lawful as well as an unlawful business may be carried on so as to prove a nuisance. *Norcross* v. *Thoms*, 51 Me. 501. Thus, using a smith's forge, operating a tobacco mill, carrying on a tannery, keeping a livery stable, and manufacturing soap, under certain circumstances, have been respectively held to constitute a nuisance. Id.; *Brady* v. *Weeks*, 3 Barb. 157. So, attaching steam power in a building that causes such a vibration and jarring to adjoining premises as to materially affect their value for rent is a nuisance, however lawful or useful the business to which the power is applied. *McKeon* v. *See*, 4 Rob. (N. Y.) 449; S. C. affirmed, 51 N. Y. (6 Sick.) 300; 10 Am. Rep. 659.

But no remedy will lie to redress a consequential injury, necessarily resulting from the lawful exercise of a right granted by the sovereign power of the State, or authorized by competent municipal authority. *Renwick* v. *Morris*, 7 Hill, 575; *Saltonstall* v. *Banker*, 8 Gray, 195; *Commonwealth* v. *Erie, etc., R. R. Co.*, 27 Penn. St. 339. The power of the legislature is omnipotent, within constitutional limits. It is sufficient to authorize railroads to run through crowded thoroughfares with locomotives, causing great disturbance to the citizens who reside near them, and exposing their residences and property to con-

stant danger of fire from sparks emitted from the engine. See *Rex* v. *Pease*, 4 Barn. & Ad. 30; *People* v. *Law*, 34 Barb. 494, 514. The same power can authorize dams to be constructed and maintained for public purposes, although they may render the common air we breathe unwholesome, producing thereby disease and death in their vicinity. But, if unauthorized by statute, these acts would be a nuisance. *People* v. *New York Gas-Light Co.*, 64 Barb. 55; S. C., 6 Lans. 467. See, also, *Denver, etc., Railway Co.* v. *Denver City Railway Co.*, 2 Col. T. 673; *Easton* v. *New York, etc., R. R. Co.*, 24 N. J. Eq. 49; *Danville, etc., R. R. Co.* v. *Commonwealth*, 73 Penn. St. 29.

In general, however lawful the business may be in itself, and however suitable in the abstract the location may be, these things cannot avail to authorize the carrying on of the business in a way which directly, palpably, and substantially damages the property of others; at least, in the absence of any thing conferring any prescriptive right, or of any grant, covenant, license, or privilege. *Robinson* v. *Baugh*, 31 Mich. 291. So, a business, as for instance, that of gunpowder-making, not a nuisance *per se*, may become so, in view of the circumstances of the neighborhood in which it is proposed to carry it on. *Wier's Appeal*, 74 Penn. St. 230. See *People* v. *Sands*, 1 Johns. 78; *Allen* v. *State*, 34 Tex. 230. On the other hand, a resident of a trading or manufacturing neighborhood is bound to submit to such ordinary personal annoyances and little discomforts as are fairly incidental to legitimate trading and manufacturing, carried on in a reasonable way. See *Huckenstine's Appeal*, 70 Penn. St. 106; 10 Am. Rep. 669. Thus, if a man live in a street where there are numerous shops, and a shop is opened next door to him, which is carried on in a fair and reasonable way, he has no ground of complaint, because to him, individually, there may arise some discomfort from the trade carried on in that shop. *Tipping* v. *St. Helen's Smelting Co.*, 4 B. & S. 608. And matters that are merely an annoyance, by being merely disagreeable or unsightly, as a well-kept butcher's shop, or a green grocery near a costly dwelling-house, or any other business that attracts crowds of orderly persons, or numbers of carts and carriages, are not nuisances, even should they affect seriously the value of the property by driving away tenants, and prevent its being let to any one who pays high rent. *Ross* v. *Butler*, 19 N. J. Eq. 294.

§ 2. **Public nuisances.** A public nuisance is such an inconvenient or troublesome offense as annoys the whole community in general, and not some particular person. 2 Broom & Had. Com. (Wait's Ed.) 460. Or, as otherwise defined, a nuisance is public when it affects the rights enjoyed by citizens as members of the public, and to which every

citizen is entitled. *King* v. *Morris, etc., R. R. Co.*, 18 N. J. Eq. 397. See, also, *State* v. *Commissioners, etc.*, 3 Hill (S. C.), 149; *Lansing* v. *Smith*, 8 Cow. 146; *Commonwealth* v. *Smith*, 6 Cush. 80; *Soltau* v. *DeHeld*, 2 Sim. (N. S.) 142; *Imperial Gas-Light, etc., Co.* v. *Broadbent*, 7 H. L. Cas. 600. Any thing offensive to the sight, smell, or hearing, erected or carried on in a public place where the people dwell or pass, or have a right to pass, to their annoyance, is a public nuisance at common law. *Hackney* v. *State*, 8 Ind. 494. So, *purprestures* are a class of public nuisances that result from an inclosure by a private party of a part of that which belongs to and ought to be open and free to the enjoyment of the public at large. *Gray* v. *Ayres*, 7 Dana (Ky.), 375; *State* v. *Paul*, 5 R. I. 185; *Brown* v. *Perkins*, 12 Gray, 89. Thus, an unauthorized inclosure of a part of a highway may be a *purpresture* and a public wrong, whether the highway be one by land or by water. *Att.-Gen.* v. *Evart Booming Co.*, 34 Mich. 462. It is, however, to be observed of a *purpresture* that it is not necessarily a public nuisance. A public nuisance must be some thing which subjects the public to some degree of inconvenience or annoyance; but a *purpresture* may exist without putting the public to any inconvenience whatever. Id.

A public nuisance cannot be tolerated on the ground that the community may realize some advantages from it. *Works* v. *Junction R. R. Co.*, 5 McLean (C. C.), 425; *Rex* v. *Tindall*, 6 Ad. & El. 143. Nor can its existence be justified nor its continuance be demanded by establishing that similar nuisances have been permitted. *People* v. *Mallory*, 2 Hun (N. Y.), 381; S. C., 4 Sup. Ct. (T. & C.) 567. And no length of time will render a public nuisance legal. *Rex* v. *Cross*, 3 Camp. 227. See *post*, 782, art. 9, § 2.

The following instances are given in illustration of what have been declared public nuisances by the courts at common law: A public gaming house (*United States* v. *Ismenard*, 1 Cranch [C. C.], 150; *Rex* v. *Rogier*, 1 B. & C. 272; *Blewett* v. *State*, 34 Miss. 606); places of amusement kept for gain (*Tanner* v. *Trustees*, 5 Hill, 121); cock-pits (*Rex* v. *Howell*, 3 Keb. 510); lotteries (*Ex parte Blanchard*, 9 Nev. 101); a common scold (*Commonwealth* v. *Mohn*, 52 Penn. St. 243; *Commonwealth* v. *Harris*, 101 Mass. 29); a powder magazine, erected in a populous part of a city, in which large quantities of gunpowder are stored (*Cheatham* v. *Shearon*, 1 Swan [Tenn.], 213); a house kept in a filthy and negligent condition, so as to endanger the public health and safety (*State* v. *Purse*, 4 McCord [S. C.], 472); the publication of an obscene newspaper (*State* v. *Hanson*, 23 Tex. 232); or the publication of an advertisement calculated to alarm the public mind unneces-

sarily (*State* v. *Cassidy*, 6 Phil. [Penn.] 82); the exhibition of a stud-horse in a public street (*Nolin* v. *Mayor*, 4 Yerg. [Tenn.] 163); urinating in a spring at which the public are accustomed to drink (*State* v. *Taylor*, 29 Ind. 517); a house of ill-fame, or bawdy house (*Clementine* v. *State*, 14 Mo. 112; *Commonwealth* v. *Howe*, 13 Gray, 26; *State* v. *Maurer*, 7 Clarke [Iowa], 406); a disorderly house (*State* v. *Williams*, 30 N. J. Law, 102; *Commonwealth* v. *Cobb*, 120 Mass. 356); a tippling house (*State* v. *Stevens*, 40 Me. 559); a house of assignation (*People* v. *Rowlands*, 1 Wheel. [C. C.] 286); any business or act which calls together a large crowd of disorderly people in a public place. *Rex* v. *Moore*, 3 B. & Ad. 184; *Commonwealth* v. *Milliman*, 13 Serg. & R. 403. So, any thing that is offensive to the morals of society (*Boom* v. *City of Utica*, 2 Barb. 104); or any act that injuriously affects the health of others (*Commonwealth* v. *Holmes*, 17 Mass. 336), is a public nuisance. All obstructions of a highway, or encroachments thereon, as well as all obstructions of navigable streams, or encroachments on the rights of the public therein, are likewise public nuisances. *Columbus* v. *Jaques*, 30 Ga. 506; *State* v. *Atkinson*, 24 Vt. 448; *Turner* v. *Ringwood Highway Board*, L. R., 9 Eq. Cas. 418; *People* v. *Vanderbilt*, 26 N. Y. (12 Smith) 287. But the term "public nuisance" applies only to something occasioned by acts done in violation of law. A work which is authorized by law cannot be a nuisance. *Hinchman* v. *Patterson, etc., R. R. Co.*, 17 N. J. Eq. 75. It is occasionally held, that if a railroad prove an obstruction to the street and a public injury, it is nevertheless not punishable as a nuisance, if constructed as prescribed by the charter. Id. But if not so constructed, it is a punishable nuisance; and a party in whose possession and control a railroad is placed, with power to continue its use, is equally liable with the original owner for a nuisance arising from the manner of its construction. *Tate* v. *M., K. & T. Railway Co.*, 64 Mo. 149.

Profane swearing is not *per se* a nuisance. But it may be done in such a manner as to become a nuisance, for instance, if loud and continued. *State* v. *Pepper*, 68 N. C. 259; S. C., 12 Am. Rep. 637; *State* v. *Powell*, 70 N. C. 67; *State* v. *Graham*, 3 Sneed (Tenn.), 134.

An object on a highway calculated to frighten a horse of ordinary gentleness—as for instance a pile of stones—may be on that ground a nuisance Such an object is not distinguishable in law from an obstruction which a traveler drives against. *Clinton* v. *Howard*, 42 Conn. 295. See *post*, 734, art. 2, § 4.

In Maine a person may be indicted and convicted for a nuisance in selling cider and wine made from fruit grown in the State, for tippling

purposes, provided the jury find they are intoxicating liquors. *State* v. *Page*, 66 Me. 418.

The person who erects, as well as the person who maintains a public nuisance, are liable to indictment therefor, jointly or individually, at the election of the prosecuting officer. *Pendruddock's Case*, 5 Coke R. 100; *Thompson* v. *Gibson*, 7 M. & W. 455; *People* v. *Erwin*, 4 Denio, 129. And if an individual sustains special damage to himself, beyond that common to the public by reason of a public nuisance, he may maintain an action for such special injury. *Barnes* v. *Hathorn*, 54 Me. 124; *Rose* v. *Groves*, 5 M. & G. 613; S. C., 1 D. & L. 61.

§ 3. **Private nuisances.** A private nuisance is defined to be any thing done to the hurt or annoyance of the lands, tenements, or hereditaments of another. 2 Broom & Had. Com. (Wait's Ed.) 220. The injury, in case of a private nuisance, is confined to but one or a few persons. *Rex* v. *Lloyd*, 4 Esp. 200. The erection of a house with the eaves projecting over the lands of another (*Fay* v. *Prentice*, 1 C. B. 828; *Aiken* v. *Benedict*, 39 Barb. 400); or so as to obstruct the ancient lights of another (*Soltau* v. *DeHeld*, 2 Sim. [N. S.] 143), is a private nuisance. And a party whose house is rendered uncomfortable for habitation by the odors and smoke of a gas-house may maintain an action as for a private nuisance. *Ottawa Gas-Light, etc., Co.* v. *Thompson*, 39 Ill. 598. So, the stopping or impeding a private way is a private nuisance. *Salter* v. *Taylor*, 55 Ga. 310.

ARTICLE II.

WHAT ARE ACTIONABLE NUISANCES.

Section 1. In general. An individual may recover for special damages from an injury which is in itself a nuisance. *Clark* v. *Peckham*, 10 R. I. 35; 14 Am. Rep. 654; *Greene* v. *Nunnemacher*, 36 Wis. 50; *Venard* v. *Cross*, 8 Kans. 248; *Grigsby* v. *Clear Lake Water Co.*, 40 Cal. 396. Thus, it is well-settled law that the obstruction of a navigable river is a public nuisance for which the person so obstructing is liable to indictment. So any person specially injured by such obstruction may maintain a special action on the case to recover damages for the loss sustained by him. *Dobson* v. *Sutton*, 58 Eng. Com. Law, 991; 9 Q. B. 991; *Dudley* v. *Kennedy*, 63 Me. 465. Keeping a large quantity of gunpowder in a building unprotected, and situated near others, is likewise a public nuisance; and if one be wounded or injured by its explosion, he is entitled to recover damages to the extent of his loss or wounds. *Myers* v. *Malcolm*, 6 Hill, 292. But an action by a private

individual for a public nuisance does not lie where the plaintiff has suffered no particular direct damages, or peculiar actual loss. And simply cutting off his facilities for making a new entrance to his lot from a public street is held not to be sufficient actual damage. *McLauchlin* v. *Charlotte, etc., R. R. Co.*, 5 Rich. (S. C.) 583.

The right of action for a nuisance does not depend upon the degree of the injury. If the right exist at all, it exists as well for a slight as for a great injury. Still, the injury must be something more than a fanciful inconvenience, a question of mere delicacy or fastidiousness, arising from elegant and dainty habits of life. *Walter* v. *Selfe*, 4 Eng. L. & Eq. 22. And see *Cleveland* v. *Citizens' Gas-Light Co.*, 20 N. J. Eq. 209. It must be a clear and plain interference with ordinary comforts or enjoyments. Id. For example, the owner of a costly house, upon a fashionable street, might regret to see the proprietor of an adjoining lot erect thereon a row of mean and unsightly tenements, but he would have no legal right of complaint. See *Pickard* v. *Collins*, 23 Barb. 444. And it is said that, where great works are carried on, which are the means of developing the national wealth, persons must not stand on extreme rights, and bring actions for every petty annoyance. *Tipping* v. *St. Helen's Smelting Co.*, 11 Jur. (N. S.) 785; 4 B. & S. 608. If, however, a business is established which sends into a neighboring house smoke and vapor, or offensive odors, or dust and dirt, to a degree which renders it uncomfortable as a habitation, the proprietor has a right of action, and would be entitled to damages in proportion to the degree of the injury. See *post*, 750, 751, §§ 10, 11, 12. And exciting constant and reasonable apprehension of danger, although no actual injury has been occasioned, is an actionable nuisance. See *Chatham* v. *Shearon*, 1 Swan (Tenn.), 213; *Barnes* v. *Hathorn*, 54 Me. 124; *Wolcott* v. *Melick*, 3 Stockt. (N. J.) 208. Thus by means of blasting rocks, "all persons on or about the premises of the plaintiff were kept in continual fear and jeopardy, rendering a proper attention to business full of fear and danger," etc., it would constitute a nuisance, and as such would form a proper ground for an action on the case. *Scott* v. *Bay*, 3 Md. 431.

To support an action for damage occasioned by a nuisance, it is not necessary that the damage sustained shall have been *direct;* it is sufficient if it was *consequential.* Thus, the erection of a dam, in a navigable stream, so as to obstruct the plaintiff's raft, is a sufficient damage. *Hughes* v. *Heiser*, 1 Binn. (Penn.) 463. And see *Seeley* v. *Bishop*, 19 Conn. 128; *Yolo* v. *Sacramento*, 36 Cal. 193. Nor can the *motive* with which the act is done have any bearing upon the question. See *Fletcher* v. *Rylands*, L. R., 1 Exch. 265; S. C. affirmed, 3 id. 352; *Chatfield* v. *Wilson*, 28 Vt. 49. The question for the court to deter-

mine is, whether the act claimed to be a nuisance is such as the party has no lawful right to do. *Att.-Gen.* v. *Sheffield Gas Co.*, 3 DeG. M. & G. 304; 19 Eng. L. & Eq. 639.

Where the gravamen of an action is the *continuance* of a nuisance, the suit will lie even after the original right of action for its creation has been barred by the statute of limitations. *McConnel* v. *Kibbe*, 29 Ill. 483; *Roberts* v. *Read*, 16 East, 215; *Staples* v. *Spring*, 10 Mass. 72.

§ 2. **Support of land.** See *ante*, tit. *Negligence*. In the case of land, which is fixed in its place, each owner has the absolute right to have his land remain in its natural condition, unaffected by any act of his neighbor; and, if the neighbor digs upon or improves his own land so as to injure his right, the other may maintain an action against him, without proof of negligence. *Richardson* v. *Vermont Central. R. R. Co.*, 25 Vt. 465; *Shafer* v. *Wilson*, 44 Md. 281; *Marvin* v. *Brewster Iron Mining Co.*, 55 N. Y. (10 Sick.) 538; S. C., 14 Am. Rep. 322.

And the fact that the defendant was not the owner of the adjoining land affords him no exemption. *Nicklin* v. *Williams*, 10 Exch. 259. But this right of property is only in the land in its *natural condition*, and the damages in such an action are limited to the injury to the land itself, and do not include any injury to buildings or improvements thereon. Thus, one who digs a pit on land so that by the operation of natural and ordinary causes, which he takes no precaution to guard against, the land of another falls into the pit, is liable to an action by the latter for the injury to his land in its natural condition (see cases cited above), but not for injuries to buildings or improvements thereon, such as fences and shrubbery, without proof of a right by grant or prescription in the plaintiff (see *Wyatt* v. *Harrison*, 3 B. & Ad. 871; *Bonomi* v. *Backhouse*, El. Bl. & El. 622; 9 H. L. Cas. 503), or of actual negligence on the part of the defendant. *Gilmore* v. *Driscoll*, 122 Mass. 199. And see *Charless* v. *Rankin*, 22 Mo. 566; *Beard* v. *Murphy*, 37 Vt. 99; *Panton* v. *Holland*, 17 Johns. 92; *Shrieve* v. *Stokes*, 8 B. Monr. (Ky.) 453. And cases of subjacent support are controlled by the same principles as those of lateral support. *Humphries* v. *Brogden*, 12 Q. B. 739. All that can be claimed by the owner of the surface, under the right of subjacent support, is that no physical injury be wrought to the surface in its natural state, or, as contemplated at the time of the grant. A mine owner is not bound to support buildings subsequently erected. *Marvin* v. *Brewster Iron Mining Co.*, 55 N. Y. (10 Sick.) 538; S. C., 14 Am. Rep. 322. And see *Wakefield* v. *Duke of Buccleuch*, L. R., 4 Eq. Cas. 613; *Salisbury* v. *Gladstone*, 9 H. L. Cas. 692. *Ante*, vol. 2, 720, 722; vol. 3, 709.

§ 3. **Party walls.** See *ante*, Vol. 2, 722, *et seq.* By the common

law, a "party wall," in the legal sense of the term, can only exist by virtue of statutory provisions, grant, or prescription. See *List* v. *Hornbrook*, 2 W. Va. 340; *Rice* v. *Roberts*, 24 Wis. 461; S. C., 1 Am. Rep. 195. In Pennsylvania, see *Roberts* v. *Bye*, 30 Penn. St. 375; in Iowa, see *Bertram* v. *Curtis*, 31 Iowa, 46; and in many of the large cities of the country, the rights and liabilities of parties in reference to party walls are regulated by statute. See *Haines* v. *Drips*, 2 Pars. Sel. Cas. (Penn.) 236; *Ferguson* v. *Van Dyke*, 2 Phil. (Penn.) 168; *Pierce* v. *Lemon*, 2 Houst. (Del.) 519; *Nash* v. *Kemp*, 49 How. (N. Y.) 522; *Miller* v. *Elliott*, 5 Cranch (C. C.), 543.

When the owners of adjoining lots, by agreement, construct a wall partly on each lot, for the common support of their buildings, the wall so constructed, if used as such for twenty years, is a party wall, in the legal sense of the term, and the owner of each house has an easement, for its support, in that portion of the wall which stands on the adjoining lot. *Webster* v. *Stevens*, 5 Duer (N. Y.), 553. So, when the owner of two adjoining lots erects a building on each, with a wall partly on each lot, for their common support, a conveyance, by him, of either lot, conveys, with the building, an easement for its support on that part of the wall which stands on the other lot. Id.; *Eno* v. *Del Vecchio*, 4 id. 53. In all cases where such an easement exists, neither owner or occupant can interfere with the wall, to the detriment of the other, without his assent. Id. See, also, *Brooks* v. *Curtis*, 50 N. Y. (5 Sick.) 639; S. C., 10 Am. Rep. 545. And the easement is held to exist so long as the wall continues to be sufficient for the purpose, and the respective buildings remain in a condition to need and enjoy the support; but that it ceases with the state of things which had created it, and that there is no right in either party, in case the other refuses to co-operate, to rebuild the wall and claim contribution. *Partridge* v. *Gilbert*, 15 N. Y. (1 Smith) 601; *Sherred* v. *Cisco*, 4 Sandf. (N. Y.) 480; *Orman* v. *Day*, 5 Fla. 385. But see *Glen* v. *Davis*, 35 Md. 208; S. C., 6 Am. Rep. 389; *Hunt* v. *Harris*, 19 C. B. (N. S.) 13.

§ 4. **Highways, obstructions in.** See *post*, tit. *Ways*. A highway is a public way for the use of the public in general, for passage and traffic, without distinction. *Starr* v. *Camden, etc., R. R. Co.*, 4 Zabr. (N. J.) 592. The restrictions upon its use are only such as are calculated to secure to the general public the largest practicable benefit from the enjoyment of the easement, and the inconveniences must be submitted to when they are only such as are incident to a reasonable use under impartial regulations. But any unreasonable obstruction of a highway is a common nuisance, and, being a wrong of a public nature, the remedy is by indictment. *Rex* v. *Russell*, 6 East, 427; *People* v.

Cunningham, 1 Denio, 524. It is not in itself a ground of civil action by an individual, unless he has suffered from it some special and particular damage, which is not experienced in common with other citizens. In such case, the actual damage constitutes the gist of the action, and must be averred and proved. *Stetson* v. *Faxon*, 19 Pick. 147; *Mayor, etc., of Baltimore* v. *Marriott*, 9 Md. 160, 178; *Houck* v. *Wachter*, 34 id. 265; S. C., 6 Am. Rep. 332. See, also, *Dawson* v. *St. Paul Fire Ins. Co.*, 15 Minn. 136; S. C., 2 Am. Rep. 109.

Any unauthorized excavation made in a street of a city is a nuisance, and all persons who continue, or in any way become responsible for it, are liable to any person who is injured thereby, while passing lawfully over the street. *Irvine* v. *Wood*, 51 N. Y. (6 Sick.) 224; S. C., 10 Am. Rep. 603. So, the cornice of a building which projects over a sidewalk in a city, and which is being constructed in such a manner as to be dangerous to persons using the sidewalk, is a nuisance. *Grove* v. *Fort Wayne*, 45 Ind. 429; S. C., 15 Am. Rep. 262. And the erection of a building in the center of a street, to be used for a market for meat, fish, etc., and as a pound for confining swine and other animals, and as a jail, in front of places of business or private residence, would be both a public and a private nuisance. *Lutterloh* v. *Mayor of Cedar Keys*, 15 Fla. 306. See, also, *Robbins* v. *Jones*, 15 C. B. (N. S.) 221; *Runyon* v. *Bordine*, 2 Green (N. J. L.), 472; *Smith* v. *State*, 6 Gill (Md.), 425; *Commonwealth* v. *Wentworth*, 1 Bright. (Penn.) 318. A railway constructed in a public street of a city, without authority of law, is a continuous obstruction, which amounts to a public nuisance. *Denver, etc., Railway Co.* v. *Denver City Railway Co.*, 2 Col. T. 673. The collection of a crowd in a public street, by means of loud and indecent language, is a public nuisance (*Barker* v. *Commonwealth*, 19 Penn. St. 412); but "making a speech" in a public street is not *per se* a nuisance (*Fairbanks* v. *Kerr*, 70 id. 86; S. C., 10 Am. Rep. 664); and the ordinary obstruction of a street by a lawful procession, and the noise of a drum and fife therein, are not *per se* a nuisance. *State* v. *Hughes*, 72 N. C. 25.

It has been held that an object within the limits of a highway, naturally calculated to frighten horses of ordinary gentleness, may be on that ground a nuisance. *Foshay* v. *Glen Haven*, 25 Wis. 288; S. C., 3 Am. Rep. 73; *Clinton* v. *Howard*, 42 Conn. 295. Thus, a tent in a highway likely to frighten horses was held to be a nuisance under a statute requiring towns to keep their highways "in good and sufficient repair" (*Ayer* v. *Norwich*, 39 Conn. 376; S. C., 12 Am. Rep. 396); and a steam roller used in repairing streets, and left by the wayside over Sunday, frightened the plaintiff's horse, and the court held it to

be a nuisance. *Young* v. *New Haven*, 39 Conn. 335. See, also, *Judd* v. *Fargo*, 107 Mass. 264. So, the plaintiff's horse was frightened by the blast from a steam whistle on the defendant's mill, situated some fifty feet from the highway, and the defendant was held liable. *Knight* v. *Goodyear, etc., Co.*, 38 Conn. 438; S. C., 9 Am. Rep. 406. And see *Smith* v. *Stokes*, 4 B. & S. 84; *Watkins* v. *Reddin*, 2 Fost. & F. 629. On the other hand it is said that the bringing of an unsightly object into the common highway is no more of a wrong because of its tendency to frighten horses of ordinary gentleness, than is the construction of a bridge over a river a wrong, because of its tendency to delay vessels. The one may be a wrong, under some circumstances, and so may the other; but it is equally true that both may be proper and lawful under other circumstances. It was accordingly held, that a steam engine as a means of locomotion in a highway is not necessarily a nuisance. *Macomber* v. *Nichols*, 34 Mich. 212; 22 Am. Rep. 522. So, it is held that a railroad company whose road passes over a highway by a bridge is not liable to a traveler in the highway for damage caused by the fright of his horse at the noise made by a train of cars passing over the bridge in the customary manner. *Favor* v. *Boston, etc., R. R. Co.*, 114 Mass. 350; S. C., 19 Am. Rep. 364. But a railway company was held liable for injuries sustained by a traveler, driving a horse upon a highway with due care, through a fright of the horse occasioned by a derrick which the company maintained projecting over the highway, so as naturally to frighten passing animals, although the derrick was maintained for the purpose of loading and unloading freight on the cars. *Jones* v. *Housatonic R. R. Co.*, 107 Mass. 261. See, also, *Hardy* v. *Keene*, 52 N. H. 370; *Morse* v. *Richmond*, 41 Vt. 435. And a water wheel near to and in view of a highway, so as to frighten horses passing it, was held to be a nuisance. *House* v. *Metcalf*, 27 Conn. 631.

Dangerous pits, excavations, precipices, walls, stones, or other obstructions, situated without the limits of the located highway, but so near it, and so situated that they would, without barriers or guards, endanger the safety of passengers using the traveled or made part of the road, with ordinary care and diligence, are nuisances. *Davis* v. *Hill*, 41 N. H. 329; *Jones* v. *Waltham*, 4 Cush. 299; *Fisher* v. *Thirkell*, 21 Mich. 1; 4 Am. Rep. 422; *Hays* v. *Gallagher*, 72 Penn. St. 136; *Atlantic, etc., R. R. Co.* v. *Wood*, 48 Ga. 565; *Portland* v. *Richardson*, 54 Me. 46. And digging post-holes in a street and leaving them unguarded is a public nuisance, although in a part of the street not used, nor susceptible of use by the public, by reason of natural obstructions therein. *Commonwealth* v. *King*, 13 Metc. 115; *Wright* v. *Saund-*

ers, 65 Barb. 214; S. C. affirmed, 36 How. 136; 3 Keyes, 323. So, where a person has been properly authorized to make an excavation in a street, he is bound to do it in a careful manner, and to see that it is properly and carefully covered, so as to make the street as safe for passage as before. *Irvine* v. *Wood*, 51 N. Y. (6 Sick.) 224; S. C., 10 Am. Rep. 603; *Homan* v. *Stanley*, 66 Penn. St. 464; 5 Am. Rep. 389; *Whitehouse* v. *Fellowes*, 10 C. B. (N. S.) 765.

It is a nuisance to set shade trees in a street or highway without authority, but if they are permitted to remain for the period of twenty years, it will be presumed they were planted by lawful authority. *Bliss* v. *Ball*, 99 Mass. 597. So, the obstruction of a public street or highway by teams, carts, carriages, and the like, continuing constantly or in close succession at a man's store, warehouse, or manufactory, although for the purposes of his trade, constitutes a public nuisance. *Rex* v. *Russell*, 6 East, 427. A placard, paraded or posted in a public street, and calculated to injure the business of one occupying a building thereon, is likewise a nuisance. *Gilbert* v. *Mickle*, 5 N. Y. Leg. Obs. 10; S. C., 4 Sandf. Ch. 357; *Spall* v. *Massey*, 2 Stark. 559. And it is held to be a nuisance to keep a dangerous and vicious dog, known to be such, so near the highway as to endanger the safety of those passing lawfully by. *Grainger* v. *Finlay*, 1 Ir. C. L. 411.

A reasonable necessity will justify actions which would otherwise be nuisances. Thus, although no man has a right to throw wood or stones into the street at his pleasure, yet, inasmuch as fuel is necessary, one may throw wood into the street for the purpose of having it carried to his house, and it may lie there for a reasonable time. So, because building is necessary, stones, brick, lime, sand and other materials may be placed in the street, provided it be done in the most convenient manner. *Wood* v. *Mears*, 12 Ind. 515; *Jackson* v. *Schmidt*, 14 La. Ann. 806; *Cushing* v. *Adams*, 18 Pick. 110. On the same principle a merchant may have his goods placed in the street, for the purpose of removing them to his store in a reasonable time. But he has no right to keep them in the street for the purpose of selling them there, because there is no necessity for it. *People* v. *Cunningham*, 1 Denio, 524. See, also, *Commonwealth* v. *Passmore*, 1 Serg. & R. 219; *Clark* v. *Fry*, 8 Ohio St. 358; *Palmer* v. *Silverthorn*, 32 Penn. St. 65; *Northrop* v. *Burrows*, 10 Abb. Pr. (N. Y.) 365; *Thorpe* v. *Brumfitt*, L. R., 8 Ch. App. 650; S. C., 6 Eng. R. 554.

Any trade or business carried on near a public road or highway, which produces noxious or offensive smells, to the annoyance of persons traveling along the public road, is a common nuisance, and is indictable. *Rex* v. *Neil*, 2 Carr. & P. 485; *Commonwealth* v. *Up-*

ton, 6 Gray, 473. Nor is it necessary that the smells should be injurious to health. It is sufficient, if they be offensive to the senses. *State* v. *Wetherall*, 5 Harr. (Del.) 487.

§ 5. **Water and water-courses.** *Prima facie* every proprietor upon each bank of a stream is entitled to the land, covered with water in front of his bank, to the middle thread of the stream. In virtue of this ownership he has a right to the use of the water flowing over it in its natural current without diminution or obstruction. See *ante*, Vol. 1, title *Boundaries*. But, strictly speaking, he has no property in the water itself, but a simple use of it, as it passes along. *Mason* v. *Hill*, 5 Barn. & Ad. 1; *Clinton* v. *Myers*, 46 N. Y. (1 Sick.) 511; S. C., 7 Am. Rep. 373; *Davis* v. *Getchell*, 50 Me. 604; *Hayes* v. *Waldron*, 44 N. H. 584. The consequence of this principle is, that no proprietor has a right to use the water to the prejudice of another (Id.; *Tyler* v. *Wilkinson*, 4 Mason [C. C.], 397), and if he does so use it, it is an actionable nuisance. *Plumleigh* v. *Dawson*, 1 Gilm. (Ill.) 544. A riparian proprietor has, however, the right to use the water which flows by or through his lands for the gratification of *natural* wants, even though the entire stream is thereby consumed. *Stein* v. *Burden*, 29 Ala. 127; *Blanchard* v. *Baker*, 8 Me. 253. And where the stream is small, and does not furnish water more than sufficient to supply the natural wants of the different proprietors living on it, none of the proprietors can use the water for either irrigation or manufacturing purposes. *Evans* v. *Merriweather*, 3 Scam. (Ill.) 492; *Arnold* v. *Foot*, 12 Wend. 330. If the stream is more than sufficient to supply natural wants, and insufficient to supply water power to each proprietor on the stream, for manufacturing purposes, and there is no contract or grant, neither proprietor has a right to use all the water. All have a right to participate in its benefit, and an action will lie against a party who diverts or consumes the whole of the stream. Id.; *Bliss* v. *Kennedy*, 43 Ill. 67, 73. And see *Swindon Waterworks Co.* v. *Wilts, etc., Nav. Co.*, L. R., 7 H. L. 697; S. C., 14 Eng. Rep. 86.

Where a right to use the water of a stream in a particular manner has been acquired by prescription, such right is measured by the extent of the previous enjoyment, and the mode and manner of the user cannot be materially varied to the injury of others, unless the use, as changed, has been continued for a period of twenty years. *Prentice* v. *Geiger*, 9 Hun (N. Y.), 350. And see *Bucklin* v. *Truell*, 54 N. H. 122; *Crosby* v. *Bessey*, 49 Me. 539. Thus, where the right acquired by prescription was to use "flush boards" on a dam for a few months in the year only, their use, or the use of any equivalent, at other times was held to be unjustified by the prescription, and that the parties in-

jured were entitled to damages arising from the use of such flush boards at times when the defendant had not been accustomed to use them. *Marcly* v. *Shults*, 29 N. Y. (2 Tiff.) 346. And see *Baldwin* v. *Calkins*, 10 Wend. 169.

It is an ancient and well-established principle, that water cannot be lawfully diverted, unless it is returned again to its accustomed channel before it passes the land of the proprietor below. Running water is not susceptible of an appropriation which will justify the diversion or unreasonable detention of it. *Blanchard* v. *Baker*, 8 Me. 253. And see *Webb* v. *Portland Manuf. Co.*, 3 Sumn. (C. C.) 189; *Bealey* v. *Shaw*, 6 East, 208; *Shields* v. *Arndt*, 4 N. J. Eq. 234; *Norton* v. *Volentine*, 14 Vt. 239. Even where there is an underground flow of water, so well defined as to be a constant stream, the owner of the land through which it flows has no right to divert it to the injury of the person on whose land it comes to the surface as a spring. *Wheatley* v. *Baugh*, 25 Penn. St. 528; *Dickinson* v. *Canal Co.*, 7 Exch. 282. And a land-owner may not negligently or maliciously divert even an unknown subterranean stream, to the damage of a lower proprietor; but he may drain, mine, or quarry, though in so doing he interferes with the flow of water in hidden, unknown underground channels. *Haldeman* v. *Bruckhart*, 45 Penn. St. 514; *Chase* v. *Silverstone*, 62 Me. 175; S. C., 16 Am. Rep. 419; *Brown* v. *Illius*, 27 Conn. 84; *Village of Delhi* v. *Youmans*, 50 Barb. 31 ; S. C. affirmed, 45 N. Y. (6 Hand) 362; 6 Am. Rep. 100.

And any diversion of running water, not *injuriously* affecting other proprietors, is allowable. *Ford* v. *Whitlock*, 27 Vt. 265. So, in general, the use of streams of water for domestic, agricultural and manufacturing purposes being, to some extent, of public right, an action for a nuisance caused by an obstruction or diversion of the water of a stream for any such purpose will not lie unless the damage occasioned thereby is *real, material and substantial*. *McElroy* v. *Goble*, 6 Ohio St. 187. But see *Chatfield* v. *Wilson*, 27 Vt. 670, in which case it is held that the wrongful diversion of a stream of water implies some damage, though merely *nominal*.

Where a right to the use of a certain quantity of water, to be taken from a running stream, is acquired under a grant from the United States government, without restriction as to the place of diversion, the mode of using the water, or the place from which it is to be taken, may be changed from time to time, so long as the rights of others are not affected injuriously by the change. *Kidd* v. *Laird*, 15 Cal. 161. And see *Butte, etc., Co.* v. *Morgan*, 19 id. 609.

As it regards ordinary water-courses, a riparian proprietor has no

right, for his own protection or convenience, to build any thing which in times of ordinary flood will throw the water on the grounds of another proprietor so as to overflow and injure them. See *Scratton* v. *Brown*, 4 B. & C. 485; *Jones* v. *Soulard*, 24 How. (U. S.) 41. Thus, a riparian proprietor on a river built a breakwater to prevent the waters encroaching upon his land, which had the effect to throw the current over upon and wash away the proprietor's lands opposite, and he was held to be liable in an action on the case. *Gerrish* v. *Clough*, 48 N. H. 9; S. C., 2 Am. Rep. 165. And it is held that every flowing back, or throwing water upon the land of another, is such an act as entitles the individual injured to his action (*Strout* v. *Millbridge*, 45 Me. 76; *Brown* v. *Bowen*, 30 N. Y. [3 Tiff.] 537); and although the act of the one person may be in itself lawful, yet, if in its consequences it necessarily damages the property of another, the party occasioning the damage is liable to make reparation commensurate with the injury he has caused. *Stout* v. *McAdams*, 2 Scam. (Ill.) 67. And see *Rudd* v. *Williams*, 43 Ill. 385; *Lee* v. *Pembroke*, 57 Me. 481; S. C., 2 Am. Rep. 59.

A company which purchases the land of a riparian owner stands in the same situation as he did with respect to the water rights connected with that land. *Swindon Waterworks Co.* v. *Wilts, etc., Canal Navigation Co.*, L. R., 7 H. L. Cas. 697; S. C., 14 Eng. R. 86.

§ 6. **Surface water.** A mere right of drainage over the general surface of land is very different from the right to the flow of a stream or brook across the premises of another; and as a general rule, no action will lie for the interruption of mere surface drainage. *Ashley* v. *Wolcott*, 11 Cush. 192; *Parks* v. *Newburyport*, 10 Gray, 28; *Gould* v. *Booth*, 66 N. Y. (21 Sick.) 62; *Bowlsby* v. *Speer*, 31 N. J. Law, 351. See *Bassett* v. *Salisbury Manuf. Co.*, 43 N. H. 569. When the situation of two adjoining fields is such that the water, falling or collected by melting snows upon one, naturally descends upon the other, it must be suffered by the owner of the lower one to be discharged upon his land, if desired by the owner of the upper one. *Kauffman* v. *Griesemer*, 26 Penn. St. 407; *Ogburn* v. *Connor*, 46 Cal. 346; S. C., 13 Am. Rep. 213; *Butler* v. *Peck*, 16 Ohio St. 334. The owner of the higher field is not, however, obliged in all cases to permit the surface water to flow upon the lower field. He has the right to level, grade, drain and improve his lands; and if by so doing the surface water is retained upon his own land, or dispersed in other directions so as not to flow upon the lower adjacent field, the owner of the latter field has no remedy against him. *Waffle* v. *New York Central R. R. Co.*, 58 Barb. 413; S. C. affirmed, 53 N. Y. (8 Sick.) 11; *Mil-*

ler v. *Laubach*, 47 Penn. St. 154; *Rawstron* v. *Taylor*, 11 Exch. 369; *Chasemore* v. *Richards*, 7 H. L. Cas. 349; *Wilson* v. *City of New Bedford*, 108 Mass. 261; S. C., 11 Am. Rep. 352. So, the owner of the lower field has the right, in the improvement thereof, to fill the same up, and if by so doing the surface water of the higher field is prevented from flowing thereon, the owner of the latter is without remedy. *Goodale* v. *Tuttle*, 29 N. Y. (2 Tiff.) 467; *Conhocton Stone Road Co.* v. *Buffalo, etc., R. R. Co.*, 3 Hun (N. Y.), 523. And see *Swett* v. *Cutts*, 50 N. H. 439; S. C., 9 Am. Rep. 276; *Dickinson* v. *Worcester*, 7 Allen, 19; *Curtiss* v. *Ayrault*, 47 N. Y. (2 Sick.) 73; *Hoyt* v. *Hudson*, 27 Wis. 656; 9 Am. Rep. 473. And the passage of surface water over land for twenty years will not create a prescription. Id. See, also, *Frazier* v. *Brown*, 12 Ohio St. 311; *Chasemore* v. *Richards*, 2 Hurlst. & N. 186; 5 id. 982; *Ogburn* v. *Connor*, 46 Cal. 346; S. C., 13 Am. Rep. 213.

The owner of a city lot may improve and fill it up, or may, if he desires to build, construct walks so as to protect his lot against the surface water from an adjoining higher lot, but the owner of the latter cannot be compelled to improve or drain his lot for the benefit of the former; so long as he leaves his lot in its natural condition, his neighbors cannot complain of the surface water. *Vanderwiele* v. *Taylor*, 65 N. Y. (20 Sick.) 341; *Bentz* v. *Armstrong*, 8 Watts & Serg. 40.

Every owner of land has the right to clean out and tube or wall up a natural spring upon his own land, for his own use and convenience, when he does not thereby change the natural course of the flow of the water therefrom, and makes no change to the injury of another, except what may result from an increased flow of water in the natural channel and outlet of such spring. This is not such a wrongful use of the easement, or abuse of the right, as will give a right of action to the owner of the servient estate. *Waffle* v. *Porter*, 61 Barb. 130.

It is, however, the general rule that the owner of the higher land has no right, even in the course of the use and improvement of his land, to collect the surface water into a drain or ditch, increased in quantity or in a manner different from the natural flow, upon the lower lands of another, to the injury of such lands. *Beard* v. *Murphy*, 37 Vt. 99; *Livingston* v. *McDonald*, 21 Iowa, 160. Surface water is a common enemy which each land-owner may reasonably get rid of in the best manner possible; but in relieving himself he must respect the rights of his neighbor. He cannot make his estate more valuable by an act which unnecessarily renders his neighbor's less valuable. Id. Thus, one who has upon his premises a marshy basin of water without a natural outlet has no right to dig a drain and discharge this water upon

the lands of another. *Butler* v. *Peck*, 16 Ohio St. 334. It is likewise held that a person has no right, by *grading* the surface of his land, to turn the surface water which originally falls upon or flows over it, upon the adjoining land of another. And it makes no difference that he does it for the purpose of preventing the water from flowing into his well, or for other lawful purpose, and with no intention to injure the adjoining owner. *Adams* v. *Walker*, 34 Conn. 466. But see *Bangor* v. *Lansil*, 51 Me. 521. So, it is held that the erection of an embankment upon one's own land, whereby the surface water on the adjoining land of another is prevented from flowing in its natural course, and caused to flow off in a different direction over the land of the latter, is a nuisance for which an action may be maintained without showing any actual damage, and for which nominal damages, at least, may be recovered. *Tootle* v. *Clifton*, 22 Ohio St. 247; S. C., 10 Am. Rep. 732. See, also, *Laney* v. *Jasper*, 39 Ill. 46. But one who, by the erection of a house or other building upon his land, diverts the surface water from its natural course, and causes it to flow upon the land of an adjoining owner, is not liable for injury thereby caused. *Bowlsby* v. *Speer*, 31 N. J. Law, 351.

§ 7. **Artificial water-courses.** Rights and liabilities in respect of *artificial* streams when first flowing on the surface are entirely distinct from rights and liabilities in respect of *natural* streams so flowing. In the case of a natural stream, the rights and liabilities of the party owning the land at its source are the same as those of the proprietors in the course below. But the water in an artificial stream flowing in the land of the party by whom it is caused to flow is the property of that party, and is not subject to any rights or liabilities in respect of other persons. *Gaved* v. *Martyn*, 19 C. B. (N. S.) 732. If the stream so brought to the surface is made to flow upon the land of a neighbor without his consent, it is a wrong for which the party causing it to so flow is liable. If there is a grant by the neighbor, the terms of the grant regulate the rights and liabilities of the parties thereto. Id. If there is uninterrupted user of the land of the neighbor for receiving the flow as of right for twenty years, such user is evidence that the land from which the water is sent into the neighbor's land has become the dominant tenement, having a right to the easement of so sending the water, and that the neighbor's land has become subject to the easement of receiving that water. Id.; *Greatrex* v. *Hayward*, 8 Exch. 291; *Norton* v. *Volentine*, 14 Vt. 246. But the submission to the exercise of an easement by the owner of the dominant estate, for his own purposes and in his own way, does not necessarily give the servient estate a right to the continuance of the easement imposed, because it is attended with inci-

dental advantages to the latter. *Beeston* v. *Weate*, 5 El. & Bl. 986; *North Eastern Railway Co.* v. *Elliot*, 1 Johns. & H. 154; *Magor* v. *Chadwick*, 11 Ad. & El. 571; *Arkwright* v. *Gell*, 5 M. & W. 203. Thus, while all the authorities agree upon the doctrine that the upper proprietor, by use for a sufficient time, may acquire the right to keep open an ancient agricultural ditch through land below for the purpose of draining his own premises (see *White* v. *Chapin*, 12 Allen, 516), it has been held that the flow of water from an agricultural drain for twenty years did not give the adjacent proprietor below such a right to the use of the water as to preclude the owner of the upper lot from cutting off the supply to improve his own land. *Greatrex* v. *Hayward*, 8 Exch. 291; *Rawstron* v. *Taylor*, 11 id. 369. Nor does the flow of water for twenty years from the eaves of a house give a right to the neighbor to insist that the house should not be pulled down, or altered so as to diminish the quantity of water flowing from the roof. *Wood* v. *Waud*, 3 id. 779. In cases of this sort no right is acquired as against the owner of the property from which the course of water takes its origin, though as between the first and any subsequent appropriation of the water-course itself such a right may be acquired. *Arkwright* v. *Gell*, 5 M. & W. 232. But it has been held that the adverse or exclusive use of water flowing through an aqueduct, by the owners and occupants of a house, for the term of twenty years, furnishes presumptive evidence of a grant, from the owner of the land through which it is brought, of a right to have it flow in the manner it has been accustomed to do for that period. *Watkins* v. *Peck*, 13 N. H. 360. See, also, *Belknap* v. *Trimble*, 3 Paige, 577.

So, the general doctrine is laid down, that if one proprietor has, during a period of twenty years or more, possessed and used a portion of the hydraulic property belonging to another proprietor, not by license or favor, but adversely and in derogation of the rights of such other proprietor, the law, upon considerations of policy and for the purpose of quieting a long possession, will presume a grant from the proprietor thus intruded upon, to the other, and will preclude the party who has thus acquiesced, from asserting the right which he otherwise would have had. *Townsend* v. *McDonald*, 12 N. Y. (2 Kern.) 381; *Law* v. *McDonald*, 9 Hun (N. Y.), 23.

It is likewise a principle of the common law, that when the owner of land has, by any artificial arrangement, effected an advantage for one portion, to the burdening of the other, upon the severance of the ownership, the holders of the two portions take them respectively charged with the servitude and entitled to the benefit openly and visibly attached at the time of the conveyance of the portion first granted.

Lampman v. *Milks*, 21 N. Y. (7 Smith) 505. Accordingly, where an owner of land, through which runs a stream, changes its course by cutting an artificial ditch to carry off its waters, and thereafter conveys that portion of the land whereon was the natural channel to one, and that upon which the burden of the stream is thus cast to another, the grantees each hold his portion according to its changed condition, the former relieved from and the latter burdened with the stream. *Roberts* v. *Roberts*, 55 N. Y. (10 Sick.) 275. In such case it is the legal right of the owner of the former to keep up the ditch in the condition it was when he purchased, and, if it become out of repair, to restore it, and to enter upon the servient premises, if necessary, for that purpose, doing no unnecessary injury. But he has no right to substantially change the condition of the ditch, so as to cause more water to flow through the same in times of freshet or flood than formerly. Id. And see *Brisbane* v. *O'Neall*, 3 Strobh. (S. C.) 348.

When city authorities changed the channel of a drain so as to throw the water flowing along it upon the land of a person lying below, it was held that this did not justify the latter in so obstructing the course of the water as to cause it to flow on the land of a third person. *Amick* v. *Tharp*, 13 Gratt. (Va.) 564.

One who accumulates water artificially on his own land is held liable for injuries resulting to adjoining land from percolations through the soil, caused by the pressure of the accumulated mass, or from the obstruction, by that cause, of the natural passage of water through the soil from such land. And a conveyance of land for the purpose of erecting a reservoir thereon is no bar to the recovery of damages by the grantor for injuries resulting to his adjoining land from percolations through the soil caused by the pressure of the water in the reservoir. *Wilson* v. *New Bedford*, 108 Mass. 261; S. C., 11 Am. Rep. 352. See, also, *Rylands* v. *Fletcher*, L. R., 3 H. L. Cas. 330; *Pixley* v. *Clark*, 35 N. Y. (8 Tiff.) 520.

The owner of a mining ditch is bound to the exercise of no greater care to avoid injury therefrom to the adjoining lands, than a prudent man would employ under similar circumstances, if he were the owner. *Campbell* v. *Bear River, etc., Co.*, 35 Cal. 679.

§ 8. **Mills and mill owners.** Every man has a right to construct a mill dam upon his own land, but in so doing he must be cautious that he does no injury to another. Every injury by means of a water-course, by throwing the water back upon the land of another above (unless a prescriptive right so to do has been acquired), is an actionable nuisance. *Hill* v. *Ward*, 2 Gilm. (Ill.) 285; *Rhodes* v. *Whitehead*, 27 Tex. 304; *Brown* v. *Bowen*, 30 N. Y. (3 Tiff.) 519; *Amoskeag Co.* v. *Goodale*,

46 N. H. 53; *Grover* v. *Sholl*, 42 Penn. St. 67. So one who builds a dam across a stream is bound so to construct it that it will resist not only ordinary freshets, but also such extraordinary floods as may be reasonably anticipated. *Gray* v. *Harris*, 107 Mass. 492; S. C., 9 Am. Rep. 61. In short, dams must be erected so as not sensibly and injuriously to affect the rights of other mill-owners. *Norway Plains Co.* v. *Bradley*, 52 N. H. 86.

Where several owners of mill-seats on a stream have a common and equal right to the use of the water, no action lies against the owner of a mill above for any damage which the owner of a mill below may incidentally suffer from the *reasonable* use of the water by the former, for his own benefit. But the owner of the mill above has not an unlimited right to use the water as he pleases, or to stop the natural flow of the stream, so as to destroy or render useless the mills below. And if he shuts down his gate, and detains the water for an unreasonable time, or lets it out in such unusual quantities as to prevent the owner of the mill below from using it, or deprives him of a reasonable and fair participation in the benefits of the stream, he will be answerable to the party injured to the extent of the loss he has thereby sustained. *Merritt* v. *Brinkerhoff*, 17 Johns. 306; *Prentice* v. *Geiger*, 9 Hun (N. Y.), 350. But see *Whaler* v. *Ahl*, 29 Penn. St. 98. Nor has a proprietor any right to create a reservoir, and detain and store the water therein for future use in a dry season. *Gould* v. *Boston Duck Co.*, 13 Gray, 442; *Clinton* v. *Myers*, 46 N. Y. (1 Sick.) 511; S. C., 7 Am. Rep. 373. But if, in seasons of drought, the water in a stream becomes inadequate for the purpose of propelling machinery, such as the stream in its ordinary stages is adequate to propel, the proprietor may detain the waters for such a reasonable time as may be necessary to raise the requisite head to enable him to use it advantageously and profitably upon such machinery. Id. And see *Pool* v. *Lewis*, 41 Ga. 162; S. C., 5 Am. Rep. 526.

It is likewise held that a mill-owner has the right, in a reasonable manner, to discharge the waste from his mill, such as sawdust, shavings, etc., into the stream, in the ordinary course of using such mill. *Jacobs* v. *Allard*, 42 Vt. 303; S. C., 1 Am. Rep. 331. But it is not a reasonable or ordinary use of a natural stream by a riparian proprietor, to allow the *shives* from his flax mill to pass down the stream; and he is held liable to one whose dam is obstructed thereby, even although the evil could be remedied by a different construction of the dam. *O'Riley* v. *McChesney*, 3 Lans. (N. Y.) 278; S. C. affirmed, 49 N. Y. (4 Sick.) 672.

It is regarded as a settled rule of law in this country, that the prior

erection of a mill upon a stream, and the appropriation of its waters to the use of such mill, do not give to the proprietor thereof the exclusive use of the water, unobstructed by the subsequent erection of other mills above or below, on the same stream. *Martin* v. *Bigelow*, 2 Aik. (Vt.) 184; *Springfield* v. *Harris*, 4 Allen, 494; *Davis* v. *Getchell*, 50 Me. 604; *Tyler* v. *Wilkinson*, 4 Mas. (C. C.) 397. No proprietor has a right to throw back water on the proprietor above or to divert it from the proprietor below, to his injury. Id. And it is held that no priority of occupation or use of water by a mill-owner upon a stream affects the right of a riparian proprietor above, to a reasonable use of the water flowing over his own land, by making improvements thereon, even to the extent of erecting a solid building upon the *alveus* of a stream, thereby diminishing the width of the current, unless such encroachment *sensibly* and *injuriously* affects the rights of such mill-owner. *Norway Plains Co.* v. *Bradley*, 52 N. H. 86. In Maine, it is held that as between proprietors of dams on the same stream, he has the better right who was first in point of time. *Lincoln* v. *Chadbourne*, 56 Me. 197. In California, it is held that if the first appropriator of water takes only a part of the quantity flowing in a stream, another may afterward appropriate the remainder, and if the first appropriates the water only during certain days in the week, another may afterward take the surplus during the remaining days of the week. *Smith* v. *O'Hara*, 43 Cal. 371. See *Thorp* v. *Freed*, 1 Mon. 651; *Columbia Mining Co.* v. *Holter*, id. 296.

Whoever seeks to establish an exclusive use of water in a particular way must show a rightful appropriation in some manner known and admitted by the law. This may be, either by a grant from all the proprietors, whose interest is affected by the particular appropriation, or by a long exclusive enjoyment, without interruption, which affords a just presumption of right. By our law, the term of twenty years of exclusive uninterrupted enjoyment has been held a conclusive presumption of a grant or right. *Tyler* v. *Wilkinson*, 4 Mas. (C. C.) 397; *Smith* v. *Adams*, 6 Paige, 435. An owner of mills on one bank, who has enjoyed the whole stream for twenty years, has presumptively a prescriptive right to the whole forever. *Matter of Water Commissioners*, 4 Edw. Ch. (N. Y.) 545. And the use of a dam for twenty years in a particular way is evidence of a right thus to use such dam. *Bucklin* v. *Truell*, 54 N. H. 122. And see *Mertz* v. *Dorney*, 25 Penn. St. 519; *Carlisle* v. *Cooper*, 19 N. J. Eq. 256; *Russell* v. *Scott*, 9 Cow. 279. If the owner of the land on one side of a stream erects a mill dam across the stream, and abuts the same upon the opposite shore, and continues and maintains the same in that position for

twenty years, that would be evidence of a grant or right to build and maintain such a dam, constructed and used substantially in the same manner. *Burnham* v. *Kempton*, 44 N. H. 78.

But merely maintaining a dam for twenty years does not give a prescriptive right to flow land as high as it can be flowed by that dam. To acquire such right, the water must be actually raised on the adjacent owner's land so often as to afford him reasonable notice, during the entire period of twenty years, that the right is being claimed against him. *Gilford* v. *Winnipiscogee Lake Co.*, 52 N. H. 262. See *Baldwin* v. *Calkins*, 10 Wend. 169; *Prentice* v. *Geiger*, 9 Hun (N. Y.), 350; *Smith* v. *Russ*, 17 Wis. 227.

If a mill-owner and his predecessors have kept up and maintained a dam for a period of twenty years, and he repairs and substantially rebuilds it, and thereby keeps up the water more uniformly, to a greater height and for a longer period of the year than it was before the dam was repaired, he is not liable in damages, unless he has so changed it as to raise the water higher than it was raised by the old dam, when tight; but for any excess over this limit, he is liable. *Jackson* v. *Harrington*, 2 Allen, 242; *Stiles* v. *Hooker*, 7 Cow. 266; *Marcly* v. *Shults*, 29 N. Y. (2 Tiff.) 346. See *Oakley Mills, etc., Co.* v. *Neese*, 54 Ga. 459.

The mere fact that a mill is *ancient*, and has had the entire use of the water of a stream, does not confer a right upon the owner as against a more recent mill-owner below, to use the water as his own convenience or interest may dictate, but he is bound to use it in a reasonable and proper manner. And a jury may find the constant use of the water entirely by night, and a detention of it during the day, to be an improper and unreasonable use; and if so, the upper proprietor is liable in an action by the lower proprietor, although such use is in good faith, and with no design to injure the rights of others. *Barrett* v. *Parsons*, 10 Cush. 367. So, if in an ancient mill, a new and different machine is erected, of another description, the operation of which is a nuisance to the mills below, the antiquity of the mill itself affords no protection to the new machine erected within it, but the latter is to be regarded as an original and independent mill. *Simpson* v. *Seavey*, 8 Me. 138. And see *Olmsted* v. *Loomis*, 6 Barb. 152; *Miller* v. *Lapham*, 44 Vt. 433; *Kuler* v. *Beaman*, 49 Me. 208.

It is an actionable nuisance at common law, for a mill-owner to turn into his mill pond a new stream which does not naturally flow into it (*Tillotson* v. *Smith*, 32 N. H. 90); and it is no defense to an action for such an injury, that the increase in the volume of water was a benefit to the party complaining, for no infringement of the rights of

another can be justified on the ground that the act is a benefit to him, if it is done against his will. Id. See, also, *Merritt* v. *Parker*, Coxe (N. J.), 460. But this rule does not affect the right to drain the surface water from lands through ditches therein into a stream which is the natural outlet, although the quantity of water in the stream is thereby increased in time of high water and diminished at other times to the damage of a riparian proprietor below. *Williams* v. *Gale*, 3 Harr. & J. (Md.) 231; *Martin* v. *Jett*, 12 La. 501; *Gannon* v. *Hargadon*, 10 Allen, 106; *Waffle* v. *New York Central R. R. Co.*, 53 N. Y. (8 Sick.) 11; S. C., 13 Am. Rep. 467.

A wooden flouring mill, run and operated by water as a motive power, is not, *per se*, a nuisance. *Minneapolis Mill Co.* v. *Tiffany*, 22 Minn. 463.

But in an action on the case, it appeared that the defendant had erected and was operating a flouring mill upon a lot adjacent to the plaintiff's dwelling-house, whereby, as the plaintiff claimed, large quantities of chaff, dust, smut, and dirt were thrown into and upon his house, rendering it uncomfortable as a habitation, and it was held that the plaintiff had a right of action, and was entitled to damages in proportion to the degree of the injury. *Cooper* v. *Randall*, 53 Ill. 24.

§ 9. **Smoke.** The owners or occupiers of dwelling-houses, whether in the city or country, have the right to enjoy pure and wholesome air, that is, as pure and wholesome as their local situation can reasonably supply; and any act which materially corrupts or pollutes the air, done without authority or justification, is strictly a nuisance. *Walter* v. *Selfe*, 4 Eng. Law & Eq. 15; *Higgins* v. *Guardians of Poor*, 22 L. T. (N. S.) 752; *Savile* v. *Kilner*, id. 277; *Wesson* v. *Washburne Iron Co.*, 13 Allen, 95; *Duncan* v. *Hayes*, 22 N. J. Eq. 26. If, therefore, a business is established which sends into a neighboring house smoke and noxious vapors, or offensive odors, or dust and dirt, to a degree which renders it uncomfortable as a habitation, the proprietor has a right of action, and will be entitled to damages in proportion to the degree of the injury. *Crump* v. *Lambert*, L. R., 3 Eq. Cas. 409; *Cooper* v. *Randall*, 53 Ill. 24. One who sends on the premises of his neighbor, noxious smells, smoke, etc., is not doing an act on his own property only, but also on his neighbor's property; because every man, at common law, has a right to the pure air, and to have no noxious smells and smoke sent on his land, unless by a period of time one has, by what is termed a prescriptive right, obtained the power of throwing a burden on his neighbor's property. *St. Helen's Smelting Co.* v. *Tipping*, 11 H. L. Cas. 642. Every thing must, however, be looked at from a reasonable point of view. Therefore, the law does not regard

trifling and small inconveniences, but injuries only which sensibly diminish the comfort, enjoyment, or value of the property affected. Id.; *Huckenstine's Appeal*, 70 Penn. St. 102; S. C., 10 Am. Rep. 669; *Luscombe* v. *Steer*, 17 L. T. (N. S.) 229; *Beardmore* v. *Tredwell*, 3 Tiff. 683; *Barnes* v. *Hathorn*, 54 Me. 124; *Cartwright* v. *Gray*, 12 Grant's Ch. (Ont.) 400. The real question in all the cases is, whether the annoyance is such as materially to interfere with the ordinary comfort of human existence. Id.; *Crump* v. *Lambert*, L. R., 3 Eq. Cas. 408.

Smoke alone may constitute a nuisance to the owner of adjoining or neighboring property, but in order to have such effect, it must either produce a tangible injury to the property, or it must sensibly impair its comfortable enjoyment. Id.; *Ross* v. *Butler*, 19 N. J. Eq. 294; *Duncan* v. *Hayes*, 22 id. 26. Thus, it has been repeatedly held, that smoke from a brick-kiln located near a dwelling-house is a nuisance, when it materially diminishes the value of the property as a dwelling, and seriously interferes with the ordinary comfort and enjoyment of it. *Barwell* v. *Brooks*, 1 L. T. (N. S.) 75, 454; *Cavey* v. *Ledbitter*, 13 C. B. (N. S.) 470; *Pollock* v. *Lester*, 11 Hare, 269; *Donald* v. *Humphrey*, 14 F. (Sc.) 1206; *Walter* v. *Selfe*, 4 Eng. Law & Eq. 15; *Campbell* v. *Seaman*, 63 N. Y. (18 Sick.) 568; S. C., 20 Am. Rep. 567. See *Huckenstine's Appeal*, 70 Penn. St. 102; S. C., 10 Am. Rep. 669. So, of smoke from a lime-kiln near a dwelling (*Slight* v. *Gutzlaff*, 35 Wis. 675; 17 Am. Rep. 476; *Hutchins* v. *Smith*, 63 Barb. 251); smoke from the chimney of a factory (*Crump* v. *Lambert*, L. R., 3 Eq. Cas. 409); or of a workshop, near a dwelling (*Simpson* v. *Savage*, 37 Eng. Law & Eq. 374; *Bennett* v. *Thompson*, id. 51); smoke from the chimney of a dwelling-house (*Rich* v. *Basterfield*, 2 Car. & K. 257); dense volumes of smoke emitted from chemical works near a dwelling (*Ward* v. *Lang*, 35 Jur. 408; *Norris* v. *Barnes*, 25 L. T. [N. S.] 622); black smoke from dye works in a populous locality (*Reg.* v. *Waterhouse*, L. R., 7 Q. B. 545); smoke from a steam planing mill near a dwelling. *Rhodes* v. *Dunbar*, 57 Penn. St. 274; *Hyatt* v. *Myers*, 71 No. Car. 271. See, also, *Thebaut* v. *Canova*, 11 Fla. 143; *Sampson* v. *Smith*, 8 Sim. 272; *Shuttleworth* v. *Cocker*, 9 Dowl. P. C. 88. Smoke and cinders from iron works near an inn (*Wesson* v. *Washburne Iron Co.*, 13 Allen, 95); smoke and odor from gas works (*Cleveland* v. *Citizens' Gas Light Co.*, 20 N. J. Eq. 201; *Ottawa Gas Co.* v. *Thompson*, 39 Ill. 598); or from a blacksmith shop. *Butler* v. *Rogers*, 1 Stockt. (N. J.) 487. And see *Whitney* v. *Bartholomew*, 21 Conn. 213.

And it is no defense to an action for an injury caused by smoke,

that the trade or business producing the smoke is lawful, or that it is carried on for necessary and useful purposes, or in a reasonable and proper manner, or in a proper place. *Stockport Water Works Co.* v. *Potter*, 7 Hurlst. & N. 159; *St. Helen's Smelting Co.* v. *Tipping*, 11 H. L. Cas. 642. And this is so, even when the work is prosecuted for the government, in providing materials requisite for national defense. *Beardmore* v. *Tredwell*, 3 Giff. 683. See *Lewis* v. *Behan*, 28 La. Ann. 130.

§ 10. **Noxious vapors.** The same rules of law applicable to smoke are likewise applied to noxious vapors which are deleterious to animal or vegetable life. Thus, in a very early case it was held that an action lies for melting lead so near to the lands of the plaintiff that it spoiled his grass and trees there growing, and destroyed his cattle pasturing there. And it was said that "although this was a lawful trade, and for the benefit of the nation, and necessary, yet this shall not excuse the action, for he ought to use his trade in waste places and great commons, remote from inclosures, so that no damage may happen to the proprietors of land next adjoining." *Poynton* v. *Gill*, 2 Rolle's Abr. 140. And such has been recognized as a correct statement of the law in many modern decisions of a recent date. See *ante*, Vol. 3, tit. *Injunction*. To constitute a nuisance, it is not necessary that the noxious trade or business should endanger the *health* of the neighborhood. It is sufficient if it produces that which renders the *enjoyment of life* and property uncomfortable. *Catlin* v. *Valentine*, 9 Paige, 575. Noxious vapors which are destructive to vegetable life create a nuisance, even though no other ill results ensue therefrom; and the fact that trees and vines are for ornament or luxury entitles them no less to the protection of the law. The law will protect a flower or a vine as well as an oak. *Campbell* v. *Seaman*, 63 N. Y. (18 Sick.) 568; S. C., 20 Am. Rep. 567. Nor does it make any difference that the vegetation is of a delicate order, and not a natural product of the soil or climate in which it is grown. *Cooke* v. *Forbes*, L. R., 5 Eq. Cas. 166; *Broadbent* v. *Imperial Gas Co.*, 7 DeG., M. & G. 436.

When the air is so corrupted by noxious vapors that, in breathing it, it leaves bad tastes in the mouths of persons, this, of itself, is held to be a sufficient nuisance. *Savile* v. *Kilner*, 26 L. T. (N. S.) 277.

The words *convenient* and *proper*, as applied to the location and surroundings of an objectionable business, have been considered in a number of late cases, and the conclusion is, so far as the general rule can be stated, that the place from which the nuisance proceeds will not be deemed fit, convenient or reasonable, if the adjacent residents suffer undue annoyance. See *Bamford* v. *Turnley*, 3 B. & S. 62; *St. Helen's*

Smelting Co. v. *Tipping*, 11 H. L. Cas. 642; *Ross* v. *Butler*, 19 N. J. Eq. 294. And the fact that the district or town has factories as well as dwellings, or has the former somewhat in excess of the latter, is no answer to the just complaints of one who in his person, family and property, suffers from a nuisance caused by the objectionable business. Id.; *Crump* v. *Lambert*, L. R., 3 Eq. Cas. 409; *Mulligan* v. *Elias*, 12 Abb. N. S. (N. Y.) 259; *Rex* v. *Niel*, 2 Carr. & P. 485.

§ 11. **Noisome smells.** It is a well-settled doctrine, that *any* use of property, whether in the exercise of a trade or business, or otherwise, which impregnates the atmosphere with noisome smells to the essential annoyance of others, is a nuisance. And actions for injuries arising from the corruption of the atmosphere by noxious smells have been upheld by the courts from a very early day. See *Aldred's Case*, 9 Coke, 58*a*; *Morley* v. *Pragnel*, Cro. Car. 510; *Rex* v. *Ward*, 1 Burr, 333; *Rex* v. *Watts*, 2 Carr. & P. 486. Nor is it necessary, in order to maintain such action, that the smells should be hurtful or unwholesome. It is enough if they are so offensive, or are productive of such annoyance, inconvenience or discomfort, as to impair the comfortable enjoyment of property, by persons of ordinary sensibilities. *Walter* v. *Selfe*, 4 Eng. Law & Eq. 20; *Stowe* v. *Miles*, 39 Conn. 426; *Smith* v. *McConathy*, 11 Mo. 517; *Ruckman* v. *Green*, 9 Hun (N. Y.), 225; *Ohio, etc., R. R. Co.* v. *Simon*, 49 Ind. 278.

Many trades and uses of property were formerly deemed nuisances *per se*, on account of the noxious smells arising therefrom, such, for instance, as a tannery (*Rex* v. *Pappineau*, 2 Str. 686), a swine stye (*Aldred's Case*, 9 Co. 58*a*), a smith's forge (*Bradley* v. *Gill*, Lutw. 69), a smelting-house (*David* v. *Grenfell*, 6 Carr. & P. 624), a glass-house (*Queen* v. *Wilcox*, 2 Salk. 458), or a candle factory (*Tohayle's Case*, Cro. Car. 510), which are now regarded as merely *prima facie* nuisances; and the presumption may be rebutted by showing that the business is so conducted and carried on as not to endanger the health, or interfere with the comfort of the neighboring inhabitants. *Dubois* v. *Budlong*, 15 Abb. Pr. (N. Y.) 445; S. C., 10 Bosw. 700; *Brady* v. *Weeks*, 3 Barb. 156. Thus, in a recent case it is held that a candle manufactory is not necessarily a nuisance (*Arnot* v. *Brown*, 1 Macq. 229), and it is remarked that science has gone far to prevent many things from being a nuisance, that were formerly of that description. It is not, therefore, very easy to determine beforehand, whether or not any given thing shall prove a nuisance. Id.

§ 12. **Slaughter-houses.** The occupation of a building as a slaughter-house is to be regarded as *prima facie* a nuisance, and where such a building exists so near dwelling-houses as to impair their comfortable

enjoyment, it is an actionable nuisance. *Catlin* v. *Valentine*, 9 Paige, 575. The business of slaughtering animals ought not to be carried on in the populous parts of a city, and, more especially, when connected with slaughtering is the act of burning bristles and boiling offal. *Dubois* v. *Budlong*, 15 Abb. Pr. (N. Y.) 445; S. C., 10 Bosw. 700. And where slaughter-houses are originally erected on vacant ground, remote from human habitations, or public places, if they become nuisances by reason of roads being afterward laid out in their vicinity, or by dwellings being subsequently erected near them, the fact of their prior existence in a place remote from dwellings is no defense. *Brady* v. *Weeks*, 3 Barb. 157; *Commonwealth* v. *Upton*, 6 Gray, 473. And see *Bankhardt* v. *Houghton*, 27 Beav. 425; *Howell* v. *McCoy*, 3 Rawle (Penn.), 256.

The bleating of calves kept over night at a slaughter-house to be slaughtered in the morning, to the serious annoyance of a family living near, was held to be a nuisance. *Bishop* v. *Banks*, 33 Conn. 118. Also, the production of offensive smells from the offal of slaughtered animals. Id. So, if the business of slaughtering cattle is conducted near a highway, so that the smell of the blood frightens horses passing in the highway, or if the skins taken from the animals are hung within easy sight of the highway, so as to produce the same result, it is a nuisance. *Scott* v. *Cox*, 15 F. C. (Sc.) 535. And when the business is carried on upon the banks of a stream, it is a nuisance to discharge the blood of the slaughtered animals into the stream, so as to corrupt and pollute the water thereof for most of the purposes for which it may be used. *Attorney-General* v. *Steward*, 20 N. J. Eq. 415. And it is no justification or defense that the waters of the stream are already partially polluted. Id. The discharge of the blood from one hundred slaughtered hogs daily into a stream must necessarily create a nuisance. Id.

In many of the States, and most of the large towns and cities, the maintenance of slaughter-houses is regulated by statute or by municipal ordinances. See *State* v. *Wilson*, 43 N. H. 415; *State* v. *Kaster*, 35 Iowa, 221; *Schuster* v. *Board of Health*, 49 Barb. 450.

In an action for disturbing the use of the plaintiff's dwelling-house by stenches arising from the defendant's slaughter-house, the testimony of the occupants of other dwelling-houses, situated at a greater distance from the slaughter-house, that they were disturbed in their houses from the same cause, is competent to show the existence of the nuisance, although incompetent on the question of damages. *Fay* v. *Whitman*, 100 Mass. 76.

§ 13. **Privies.** Privies are *prima facie* nuisances, and when they

are so constructed or are kept in such a condition as to seriously interfere with the proper enjoyment by others of their property, they are held to be nuisances, in fact, and the person erecting or maintaining them is liable for all the injurious consequences arising therefrom. *Tenant* v. *Goldwin*, 2 Ld. Raym. 1089; S. C., 6 Mod. 311; *Rex* v. *Pedley*, 1 Ad. & El. 822; *Cook* v. *Montagu*, 26 L. T. (N. S.) 471; *Wahle* v. *Reinbach*, 76 Ill. 322. Noisome smells arising from a privy constitute a nuisance. *Jones* v. *Powell*, Hutt. 135. And the escape of filthy matter therefrom so as to contaminate the water of a well or spring is a nuisance. *Norton* v. *Scholefield*, 9 M. & W. 665; *Wormersley* v. *Church*, 17 L. R. (N. S.) 190.

The defendant, who owned a building, rented the lower story to the plaintiff, and the upper stories to other tenants. There was, in the upper part, a water-closet to which all the tenants had access, and which, though properly constructed, had become out of order by reason of the negligence of the tenants, of which fact the defendant had notice, and he was held liable for the damages occasioned to the plaintiff's goods by reason of the overflow of the water-closet. *Marshall* v. *Cohen*, 44 Ga. 489; S. C., 9 Am. Rep. 170. *Ante*, 256, 278

§ 14. **Tallow factories, etc.** Establishments for the melting of fat were formerly classed among nuisances *per se*, and, in actions for their abatement, it was not required that ill effects be shown. See *Downie* v. *Oliphant*, 17 F. C. (Sc.) 491; *Morley* v. *Pragnel*, Cro. Car. 510. But, latterly, such establishments are regarded as *prima facie* nuisances, when erected in public places or near the habitations of men. *Dubois* v. *Budlong*, 15 Abb. Pr. (N. Y.) 445; S. C., 10 Bosw. (N. Y.) 700; *Cropsey* v. *Murphy*, 1 Hilt. (N Y.) 126. See *Blunt* v. *Hay*, 4 Sandf. Ch. 363; *Allen* v. *State*, 34 Tex. 230. In order to maintain an action for a nuisance arising from such source it is sufficient if the enjoyment of life is thereby rendered uncomfortable. *Rex* v. *White*, 1 Burr. 333.

§ 15. **Soap and bone boileries.** Establishments for boiling bones and manufacturing soap are likewise regarded as *prima facie* nuisances. And in an early case, it was held of a soap boilery in London that "though such a trade is honest and may be lawfully used, yet if, by its stench, it be offensive to the neighbors, it is a nuisance." Jeffries, C. J., in *Rex* v. *Pierce*, 2 Show. 327. It is not necessary, to render such a trade a nuisance, that the odors or gases produced thereby should be noxious or unwholesome; if they are offensive and disagreeable in such manner as to render life uncomfortable, it is sufficient. *Meigs* v. *Lister*, 23 N. J. Eq. 199. And it is held that the court can prohibit trades of this character from being carried on in a great city, or in a dense population, on the broad principle that all trades that render

the enjoyment of life and property uncomfortable must recede with the advance of population, and be conducted in the outskirts of the city, or in the country. This is on the principle that every man must so use his property as not to injure the rights of his neighbor. *Howard* v. *Lee*, 3 Sandf. (N. Y.) 281.

And an action may be maintained by an owner of *vacant lots* to recover damages for the injuries occasioned thereto, by the offensive and noxious smells emitted from bone boiling establishments, whereby the production and market value of the lands have been depreciated, and the lands rendered unsaleable, unproductive, unwholesome and unfit for residence or occupation, and whereby he has been hindered and prevented from deriving any revenue or profit therefrom, and from improving or selling the same for building sites. *Ruckman* v. *Green*, 9 Hun (N. Y.), 225.

§ 16. **Hog styes and cattle yards.** Inclosures in a city or town, or near highways or dwellings, wherein are kept large numbers of hogs or cattle, if suffered to remain in an unclean or filthy condition, or if, by reason of excessive noise, they disturb the quiet of the neighborhood, are held to be nuisances and are actionable and indictable as such. See *State* v. *Payson*, 37 Me. 361; *State* v. *Kaster*, 35 Iowa, 221; *Wanstead Local Board* v. *Hill*, 13 C. B. (N. S.) 479; *Babcock* v. *New Jersey Stock Yard Co.*, 20 N. J. Eq. 296. Nor is it any justification or defense that such inclosures have been continuously kept for the purpose for thirty years, and when first established were remote from human habitations and some distance in the country, but by the increase of population and the extension of a city, they afterward became a nuisance. *Ashbrook* v. *Commonwealth*, 1 Bush (Ky.), 139. See, also, *Commonwealth* v. *Upton*, 6 Gray, 473.

A distillery with styes in which large quantities of hogs are kept, the offal from which renders the waters of a stream unwholesome and the vapors from which render a dwelling uninhabitable, is clearly a nuisance. *Smith* v. *McConathy*, 11 Mo. 517.

And where a railroad company erect cattle pens upon their right of way for purposes of shipping, they are required to exercise such a supervision over them as will insure the cleanliness of the pens, so that they will not become generators of noxious and unwholesome gases, depriving residents in their vicinity of the comfortable use and enjoyment of their property. And if, by reason of negligence and carelessness, in respect to such pens, they are suffered to become a nuisance, rendering the houses of those in the vicinity uncomfortable and unwholesome, the company must respond in damages for the injuries thus occa-

sioned. *Illinois Central R. R. Co.* v. *Grabill*, 50 Ill. 241. And see *Babcock* v. *New Jersey Stock Yard Co.*, 20 N. J. Eq. 296.

§ 17. **Tanneries.** It is held that a tannery is not *per se* a nuisance. *State Marshall* v. *Street Commissioners*, 36 N. J. Law, 283. And see *Rex* v. *Pappineau*, 2 Str. 686. But erecting a tannery on the upper part of a stream, corrupting its waters and rendering them injurious to those below, is a nuisance. *Howell* v. *McCoy*, 3 Rawle (Penn.), 256. So, it is a nuisance to place the refuse matter from a tannery on a vacant lot so near dwelling-houses that the offensive smells therefrom render the houses unfit for habitation, and any one who has sustained damage, peculiar to himself, from such nuisance, has a cause of action against the person erecting or maintaining it. *Francis* v. *Schoellkopf*, 53 N. Y. (8 Sick.) 152. And where the owners of a tannery situated upon a stream threw tan bark and other materials into the stream, thereby clogging the waters and causing damage to a mill-owner below, it was held to be an actionable nuisance. *Honsee* v. *Hammond*, 39 Barb. 89. See, also, *Thomas* v. *Brackney*, 17 id. 654.

§ 18. **Livery stables.** It is said that a stable in a town is not, like a slaughter pen or a hog stye, necessarily or *prima facie* a nuisance. But if it be so built, so kept, or so used as to destroy the comfort of persons owning or occupying adjoining premises, and impair their value as places of habitation, or if the adjacent proprietors are annoyed by it in any manner which could be avoided, it becomes an actionable nuisance. *Dargan* v. *Waddell*, 9 Ired. (N. C.) L. 244; *Burditt* v. *Swenson*, 17 Tex. 489; *Kirkman* v. *Handy*, 11 Humph. (Tenn.) 406; *Morris* v. *Brower*, Anth. N. P. (N. Y.) 368. A livery stable in a city created within sixty-five feet of a hotel was held to be *prima facie* a nuisance. *Coker* v. *Birge*, 10 Ga. 336. See, also, *Aldrich* v. *Howard*, 8 R. I. 246. And it is enough to sustain an action for an injury resulting from a livery stable as a nuisance, to establish the injury either from offensive smells, noise or the unwarrantable collection of flies; and it is no defense to such an action that the stable was well and properly built, in a locality as unobjectionable as would be any in the town or city, and is properly kept and managed. Id. And evidence tending to show that other stables similarly situated do not create similar annoyance to neighboring householders, may properly be excluded as irrelevant. Id. See *Draper* v. *Sperry*, 4 L. T. (N. S.) 365; *Pickard* v. *Collins*, 23 Barb. 444; *Harrison* v. *Brooks*, 20 Ga. 537; *Broder* v. *Saillard*, L. R., 2 Ch. Div. 692; 17 Eng. R. 693.

§ 19. **Noises and vibrations.** Noises are not *ex necessitate* nuisan-

ces, even when disagreeable. *Butterfield* v. *Klaber*, 52 How. (N. Y.) 255. But it is now well settled, that mere noise *alone*, although not injurious to health, if unusual, ill-timed or deafening, may constitute a nuisance to the owner of neighboring or adjoining property, such as will authorize an action therefor. Id.; *Fish* v. *Dodge*, 4 Denio, 311; *Crump* v. *Lambert*, L. R., 3 Eq. Cas. 409; *Soltau* v. *DeHeld*, 9 Eng. Law & Eq. 104; *Davidson* v. *Isham*, 1 Stockt. (N. J.) 186.

But a nuisance of this kind is much more difficult to prove than when the injury complained of is the demonstrable effect of a visible or tangible cause, as when waters are fouled by sewage, or when the fumes of mineral acids pass from the chimneys of factories or other works over land or houses producing deleterious physical changes which science can trace and explain. A nuisance by noise is emphatically a question of degree. *Gaunt* v. *Fynney*, L. R., 8 Ch. App. 8; S. C., 4 Eng. R. 718. The real test is, whether the noise alleged to be a nuisance is such as to interfere with the comfortable existence of reasonable people, or those who are able and willing to enjoy life, subject to the inconvenience necessarily resulting from the reasonable use by a neighbor of his own property (*Davidson* v. *Isham*, I Stockt. [N. J.] 186; *Campbell* v. *Seaman*, 2 Sup. Ct. N. Y. [T. & C.] 235; S. C. affirmed, 63 N. Y. [18 Sick.] 568; 20 Am. Rep. 567; *Butterfield* v. *Klaber*, 52 How. [N. Y.] 255), or whether it is produced at such unreasonable hours as to disturb the repose of people dwelling within its sphere. Id. And the character or quality of the noise is always taken into consideration, as well as the quantity and the time when it is produced. See *Bishop* v. *Banks*, 33 Conn. 121; *Dennis* v. *Eckhard*, 3 Grant's (Penn.) Cas. 390.

Building a smith's forge so near another's dwelling, and making such noises with the hammers, that the inmates of the dwelling could not sleep, was held to be an actionable nuisance. *Bradley* v. *Fill*, 1 Lutw. 69; *Dennis* v. *Eckardt*, 3 Grant's (Penn.) Cas. 390. So, where one carried on the business of finishing steam boilers in the compact part of a city, whereby the occupant of an adjoining dwelling was annoyed by the noise and dust, it was held that such occupant might maintain an action against the manufacturer. *Fish* v. *Dodge*, 4 Denio, 311. The disturbance of the rest and comfort of a family by the constant barking and howling of a dog (*Brill* v. *Flagler*, 23 Wend. 354); the noise made by the bleating of calves and other animals at night, in a cattle-pen near a dwelling, by reason of which a family was disturbed and broken of its rest (*Bishop* v. *Banks*, 33 Conn. 121), and the noise made by the stamping of horses at night, on the plank floor of a livery stable near a dwelling-house, whereby the value of the house as a dwell.

ing was impaired (*Dargan* v. *Waddell*, 9 Ired. [N. C.] 244; *Ball* v. *Ray*, L. R., 8 Ch. App. 467; 6 Eng. R. 435), are all held to be nuisances. Id. So, the ringing of bells in a building located near a dwelling may be so annoying to the inmates of the dwelling as to constitute a nuisance. *Soltau* v. *DeHeld*, 9 Eng. Law & Eq. 104. And the use of a steam whistle, which is unnecessary to the successful prosecution of a business, may be designated as a nuisance. *Butterfield* v. *Klaber*, 52 How. (N. Y.) 255; *Davidson* v. *Isham*, 1 Stockt. (N. J.) 186. The noise of the music and shouting in a circus, which was erected near a dwelling house, and in which performances took place every evening, was held to be such a nuisance as the court would restrain by injunction. *Inchbald* v. *Robinson*, L. R., 4 Ch. App. 388. And the collection of a crowd of noisy and disorderly people, to the annoyance of the neighborhood, outside of grounds in which entertainments with music and fireworks are being given for profit, is a nuisance for which the giver of the entertainments is liable, even though he has excluded improper characters from the grounds, and the amusements within the grounds have been conducted in an orderly manner. *Walker* v. *Brewster*, L. R., 5 Eq. Cas. 25.

It is a well-settled doctrine, that for injuries which unavoidably result from the ordinary use of property, no nuisance can arise (see *ante*, 726, art. 1, § 1); but it has been repeatedly held, that a trade or business which is productive of excessive noise or vibration is not an ordinary use of property, and may, therefore, become a nuisance. Thus, it is held that a nuisance may consist in the application of steam as a motive power to an engine, and using the same for sawing and cutting stone and marble by means of machinery, thereby producing a vibration and shaking of the neighboring buildings and injury thereto, and causing an offensive noise, interfering with the quiet use of such buildings, alarming the tenants, and diminishing the rent. *McKeon* v. *See*, 4 Robt. (N. Y.) 449; S. C., 51 N. Y. (6 Sick.) 300; 10 Am. Rep. 659. See, also, *Johnson* v. *Constable*, 3 D. (S. C.) 1263. So, a heavy printing press in the vicinity of a dwelling produced vibratory and jarring sounds and motions which shook and injured the building, and it was held that the business of printing in that locality, and producing such results, was a nuisance. *Robertson* v. *Campbell*, 13 F. C. (Sc.) 61. And where the defendants carried on the business of working iron and steel, near the dwelling-house of the plaintiff, and in the prosecution of such business, loud, heavy jarring, varying or agitating hammering or battering sounds or noises, were produced, thereby impairing the comfortable enjoyment of the plaintiff's property, and injuring the property itself, the defendants were held liable. *Elliotson* v. *Feetham*,

2 Bing. N. C. 134. *Ante*, 766. And the fact that the business was a lawful and useful one, and was established before the plaintiff came to the neighborhood, was held to be no defense. Id. See, also, *Scott* v. *Firth*, 10 L. T. (N. S.) 241.

An action lies against a railroad company for a nuisance, in running their cars and engines, ringing bells, blowing off steam, and making other noises in the neighborhood of a church, or meeting-house, on the Sabbath, and during public worship, which so annoy and molest the congregation worshiping there as greatly to depreciate the value of the house, and rendering it unfit for a place of religious worship. *First Baptist Church* v. *Schenectady, etc., R. R. Co.*, 5 Barb. 79. See *contra*, *First Baptist Church* v. *Utica, etc., R. R. Co.*, 6 id. 313. But the disturbance of a person in attendance upon divine service, and while engaged in religious exercises in the church, by making loud noises or otherwise, is an injury for which no action can be maintained by him. *Owen* v. *Henman*, 1 Watts & S. 548. See, also, *Mainwaring* v. *Giles*, 5 Barn. & Ald. 356; *State* v. *Linkhaw*, 69 N. C. 214; S. C., 12 Am. Rep. 645. The injury in such case is not of a *temporal*, but of a *spiritual* nature, for which no action lies. *Sparhawk* v. *Union, etc., R. R. Co.*, 54 Penn St. 401; *Jones* v. *Stone*, 1 Ld. Raym. 579. Or, if the injury is a nuisance at all, it is a *public* nuisance, and punishable only by indictment. See *Owen* v. *Henman*, 1 Watts & S. 548.

§ 20. **Navigable streams.** All navigable streams are regarded as highways for commerce, and in this respect they are subject to about the same rules as highways upon land. Those who, for commercial purposes, are using a navigable stream as a highway for vessels, have the primary and paramount right to it, and every interference with, or obstruction of the navigation, or hindrance to the free passage of vessels upon it, is *prima facie* a nuisance, and unlawful. *People* v. *Vanderbilt*, 38 Barb. 282; S. C. affirmed, 26 N. Y. (12 Smith) 287; *King* v. *Sanders*, 2 Brev. (S. C.) 111; *Davis* v. *Winslow*, 51 Me. 264; *State* v. *Babcock*, 1 Vroom (N. J.), 29; *Beach* v. *Schoff* 28 Penn. St. 195; *Milwaukee Gas Co.* v. *Steamer Gamecock*, 23 Wis. 144. Thus a bridge erected without competent authority, across a navigable stream, is a nuisance. *Barnes* v. *Racine*, 4 Wis. 454; *Commonwealth* v. *New Bedford Bridge Co.*, 2 Gray, 339; *Chenango Bridge Co.* v. *Lewis*, 63 Barb. 111. The same is true of the erection of a dam. *Dunbar* v. *Vinal*, 2 Dane's Abr. 695. And *any* permanent structure erected in, over, or upon a navigable stream, without due authority of law, is held to be a common nuisance (*Att.-Gen.* v. *Terry*, L. R., 9 Ch. App. 423; S. C., 9 Eng. R. 523); floating docks (*Bigelow* v. *Newell*, 10 Pick. 348; *Hecker* v. *New York Balance Co.*, 13 How. [N. Y.] 549); and

floating store-houses (*Hart* v. *Mayor, etc.*, 9 Wend. 571); in a navigable river, are public nuisances. Id.; *Wetmore* v. *Atlantic White Lead Co.*, 37 Barb. 70. And driving piles in the channel of a navigable river, thereby impeding navigation, is a nuisance. *Walker* v. *Shepardson*, 2 Wis. 384. So, the fact that a vessel, adapted in all respects to the navigation of a river, has, without touching bottom, come in contract with a *telegraph cable*, and thereby received injury, is held to be *prima facie* evidence that the telegraph company has unlawfully obstructed navigation and caused the injury, and if unexplained, authorizes a finding to that effect, and a judgment against it for the amount. *Blanchard* v. *West. Union Tel. Co.*, 67 Barb. 228; S. C., 3 N. Y. Sup. Ct. (T. & C.) 775; S. C. affirmed, 60 N. Y. (15 Sick.) 510.

In furtherance of commerce and travel, slight obstructions, and such as may temporarily interrupt the passage of vessels, or occasion a cursory inconvenience, but which do not materially impair navigation, are made lawful and tolerated by reason of the greater public good that results from these inconsiderable disturbances of the right of the public to the free and uninterrupted use of navigable streams. It is upon this principle that the bridging of streams, the building of wharves and other like acts are permitted, the necessary obstruction in every case being reduced to its minimum. See *Delaware etc., Canal Co.* v. *Lawrence*, 2 Hun (N. Y.), 163; S. C. affirmed, 56 N. Y. (11 Sick.) 612; *Gilman* v. *Philadelphia*, 3 Wall. (U. S.) 724; *Mississippi, etc., R. R. Co.* v. *Ward*, 2 Black (U. S.), 485; *State* v. *Portland, etc., R. R. Co.*, 57 Me. 402. But if there is an unnecessary interference with the navigation, the act becomes unlawful by reason of the excess of the limits within which obstructions are allowed in the interests of the public. Id.; *Blanchard* v. *Western Union Tel. Co.*, 60 N. Y. (15 Sick.) 510; *State* v. *Freeport*, 43 Me. 198; *State* v. *Dibble*, 4 Jones (N. C.), 107; *Jollife* v. *Wallasley*, 29 L. T. (N. S.) 592. A draw-bridge over navigable water, although it unavoidably occasions some delay in passing it, is not necessarily such an obstruction to the navigation as to amount to a nuisance. The delay is submitted to in consideration of the benefits conferred. *Works* v. *Junction Railroad*, 5 McLean (C. C.), 425. But where a railroad company is authorized by its charter to erect a bridge over a navigable stream, with the proviso that the navigation of the stream shall not be thereby obstructed, it is held that a temporary obstruction, such as the necessary framework and scaffolding used in the erection of the bridge, is an obstruction within the meaning of the charter, for which the company will be liable to any person damaged thereby. *Memphis, etc., R. R. Co.* v. *Hicks*, 5 Sneed (Tenn.), 427.

The true question in the case of a nuisance in a port is, whether or not a damage occurs to the navigation in the particular locality. And it is held that if the thing complained of be a hindrance to the navigation, it is no defense that the public inconvenience is counterbalanced by the benefit to be afforded by it. *Reg.* v. *Betts*, 16 Q. B. 1023. But where the mere presence in a ship canal of a floating elevator is not of itself an obstruction to navigation, but it only becomes such when used in a particular manner, a court of equity will not direct the removal of the elevator, but will simply forbid its use in such unlawful manner. *People* v. *Horton*, 64 N. Y. (19 Sick.) 610; affirming S. C., 5 Hun, 516. See *Dimes* v. *Petley*, 15 Ad. & El. (N. S.) 274; *Bainbridge* v. *Sherlock*, 29 Ind. 364.

The right to draw water from a navigable stream for purposes other than are purely and strictly *domestic* is subordinate to the right of navigation. It is therefore held that the abstraction or diversion of the water of the stream for purposes of manufacturing, or even for pavement washing, baths, etc., so as to interfere with the navigability of the stream, is a nuisance. *City of Philadelphia* v. *Gilmartin*, 71 Penn. St. 140. See, also, *Medway Co.* v. *Romney*, 9 C. B. (N. S.) 575; *Att.-Gen.* v. *Great Eastern R. R. Co.*, L. R., 6 Ch. App. 572. But if a supply of water be taken for domestic purposes only, the law of paramount necessity will justify the taking. *City of Philadelphia* v. *Collins*, 68 Penn. St. 106.

A person who should cast, at random, filth or trash into a dock, or waste materials into a public river, to float or sink, as it may, without guidance or direction, can in no just sense be said to be in the use of such dock or river for purposes of navigation. *Gerrish* v. *Brown*, 51 Me. 256. If, therefore, a person obstructs a stream which is by law a public highway, by casting therein waste material, filth or trash, or by depositing material of any description, except as connected with the reasonable use of such streams as a highway, or by direct authority of law, he does it at his peril; it is a public nuisance for which he would be liable to an indictment, and to an action at law by any individual who should be specially damaged thereby. Id.; *Manhattan Gas Co.* v. *Barker*, 7 Robt. (N. Y.) 523; S. C., 36 How. 233; *Potter* v. *Froment*, 47 Cal. 165; *Goldsmid* v. *Tunbridge Wells*, L. R., 1 Eq. Cas. 166; *Att.-Gen.* v. *Colney Hatch Lunatic Asylum*, L. R., 4 Ch. App. 146; *Att.-Gen.* v. *Cockermouth Local Board*, L. R., 18 Eq. Cas. 172; 9 Eng. R. 720; *Clark* v. *Peckham*, 10 R. I. 35; 14 Am. Rep. 654. If the owners of a mill cast the slabs, edgings and other waste of the mill into the river, to be floated away by the stream, and thereby the navigation of the river is obstructed, or the rights of private individuals

are infringed upon, the mill-owners will be liable to an action for the damages caused by their unauthorized acts. *Gerrish* v. *Brown*, 51 Me. 256. See, also, *City of Ogdensburgh* v. *Lovejoy*, 2 Sup. Ct. N. Y. (T. & C.) 83; S. C. affirmed, 58 N. Y. (13 Sick.) 662. So, one who is injured by the deposit in a public river of mash from a brewery sustains a special injury which entitles him to maintain an action for its suppression (*Mayor of New York* v. *Baumberger*, 7 Robt. [N. Y.] 219); provided he be the owner of the bed of the river. *Hudson River R. R. Co.* v. *Loeb*, id. 418. But a mere obstruction to a public navigable stream, unaccompanied by any personal injury, does not authorize an action by a private person. Id.

Raftsmen on navigable streams have no right to moor their rafts in such a manner as to deprive wharf owners of access to their wharfs, and such an obstruction may be treated as a nuisance. *Harrington* v. *Edwards*, 17 Wis. 586; *Moore* v. *Jackson*, 2 Abb. N. C. (N. Y.) 211. See *Powers* v. *Irish*, 23 Mich. 429. But a vessel sunk in the channel of a navigable river, by accident or misfortune, is not regarded as a nuisance. *Rex* v. *Watts*, 2 Esp. 675; *Cummins* v. *Spruance*, 4 Harr. (Del.) 315. See *Merritt* v. *Earle*, 29 N. Y. (2 Tiff.) 115.

In a recent case in the supreme court of the United States it is held that a pier erected in the navigable water of the Mississippi river for the sole use of the riparian owner, as part of a boom for saw logs, without license or authority of any kind, except such as may arise from his ownership of the adjacent shore, is an unlawful structure, and the owner is liable for the sinking of a barge run against it in the night. *Atlee* v. *Packet Company*, 21 Wall. (U. S.) 389. So, in a case recently decided in England, the doctrine is laid down, that an owner of land at the side of a public navigable river has no right to erect on the bed of the river, for the benefit of his own trade, any structure, whether any actual obstruction to the navigation of the river will or will not be thereby occasioned; and any benefit to his own trade is too remote to be held for the advantage of the public generally, such as will justify the erection. *Attorney-General* v. *Terry*, L. R., 9 Ch. App. 423; S. C., 9 Eng. R. 523.

§ 21. **Pollution of water.** It is a well-settled doctrine, that the owner of land through which a natural stream of water passes has no right, in the absence of express grant or prescription, to use the water for such purposes as will corrupt it to the injury of other riparian owners. An injury to the purity or quality of the water, to the detriment of other riparian owners, constitutes, in legal effect, a wrong and an invasion of private right, in like manner as a permanent obstruction or diversion of the water. It tends directly to impair and destroy the

use of the stream by others for reasonable and proper purposes. *Mason* v. *Hill*, 2 Nev. & Man. 747; S. C., 5 B. & Ad. 1; *Stockport Waterworks Co.* v. *Potter*, 7 Hurlst. & N. 160; *Holsman* v. *Boiling Spring Bleaching Co.*, 14 N. J. Ch. 335; *Merrifield* v. *Lombard*, 13 Allen, 16; *Dwight Printing Co.* v. *Boston*, 122 Mass. 583. So, the rule is general that any person interested in the use and enjoyment of the water of a running stream is entitled to maintain an action for any special injury he may sustain from the corruption of the water by any other person, directly or indirectly, whatever may be the cause, pretense or occasion. *Carhart* v. *Auburn Gas Light Co.*, 22 Barb. 297; *Stein* v. *Burden*, 24 Ala. 130; *Story* v. *Hammond*, 4 Ohio, 376; *Mayo* v. *Turner*, 1 Munf. (Va.) 405. And the pollution of the waters of a navigable stream, so as to impair their value for domestic purposes, is as much a nuisance and actionable as though the stream was not navigable. See *Wilts, etc., Navigation Co.* v. *Swindon, etc., Co.*, L. R., 9 Ch. App. 451; 9 Eng. R. 546; *Conservators of River Thames* v. *Mayor of Kingston*, 12 L. T. (N. S.) 667; *Watson* v. *City of Toronto, etc.*, 4 Up. Can. R. 158; *Philadelphia* v. *Gilmartin*, 71 Penn. St. 140. It is not, however, every interference with water imparting impurities thereto that is actionable, but it must be such interference as substantially impairs its value for the ordinary purposes of life. *Atty.-Gen.* v. *Gee*, L. R., 10 Eq. Cas. 131; *Robertson* v. *Stewart*, 9 G. & M. (S. C.) 189. The abatement of a nuisance does not necessarily mean the entire and absolute removal of all pollution of a stream, and all disagreeable odor, but such diminution of pollution and smell as to render it such as ought fairly and reasonably to be submitted to. Id.

A proprietor of land has a right to enjoy the use of the waters of a river which flows upon his land, for his cattle and for domestic purposes, without having their purity destroyed by the discharge of slops, manure and other offensive and deleterious substances from a distillery, cattle stables or hog yard maintained by an upper proprietor on the same stream (*Atty.-Gen.* v. *Steward*, 20 N. J. Eq. 415; *Smith* v. *McConathy*, 11 Mo. 517; *Greene* v. *Nunnemacher*, 36 Wis. 50); and a violation of this riparian right may be such ground of special damage as will entitle him to maintain a private action, as for a nuisance, against such upper proprietor. Id. So, for placing and keeping a deleterious substance so near a well as thereby to occasion damage to another, an action is maintainable, although from such keeping no damage would have occurred, except for the extraordinary, yet not uncommon, action of the elements. *Woodward* v. *Aborn*, 35 Me 271. So, the erection of a cess-pool so near a well as thereby to contaminate the water of the well, and impair its value for domestic purposes, is an

actionable nuisance. *Norton* v. *Scholefield*, 9 Mees. & W. 665. And see *Brown* v. *Illins*, 25 Conn. 585. And the maintenance of dams, drains or ditches which emit disagreeable or unwholesome odors, is not only an actionable, but also an indictable nuisance. *Mills* v. *Hall*, 9 Wend. 315; *Rogers* v. *Barker*, 31 Barb. 447; *Story* v. *Hammond*, 4 Ohio, 376; *Rhodes* v. *Whitehead*, 27 Tex. 304.

As it regards the question of liability for the pollution of water, it is immaterial whether the pollution arises from private works, or is the result of the drainage of towns under legislative authority. Thus, it is held that riparian owners and the public have the right to take water from navigable streams, and the pollution of such water, so as to destroy its value for *primary* purposes by leading into the same the sewage of the town, is a nuisance (*Conservators of River Thames* v. *Mayor of Kingston*, 12 L. T. [N. S.] 667); and the fact that sewage has been sent there for many years does not give a prescriptive right to continue it when, by the increase therein, it becomes a nuisance. Id.; *Wood* v. *Sutcliffe*, 8 Eng. Law & Eq. 217. See, also, *Hudson River R. R. Co.* v. *Loeb*, 7 Robt. (N. Y.) 418. And the fact that the public convenience, or the preservation of the public health, requires the sewage of a town to be removed, conjoined with the fact that the only method by which it can be disposed of is to discharge it into a running stream, will not justify its discharge into such stream to the injury of riparian owners. *Att.-Gen.* v. *Leeds*, L. R., 5 Ch. App. 589; *Att.-Gen.* v. *Colney Hatch Lunatic Asylum*, 4 id. 147. But the rule is otherwise when the water has been given over to *secondary* uses. If, in such case, the water becomes polluted by the emptying into it of city sewers, so that a riparian proprietor cannot use it for manufacturing purposes as he has been before accustomed to do, he cannot recover against the city for the pollution, so far as it is attributable to the plan of sewerage adopted by the city (*Merrifield* v. *City of Worcester*, 110 Mass. 216; S. C., 14 Am. Rep. 592); though he can recover for it so far as it is attributable to the improper construction or unreasonable use of the sewers, or to the negligence or other fault of the city in the care or management of them. Id. See *ante*, tit. *Municipal Corporations*.

Where a prescriptive right to foul a stream has been acquired, the fouling must not be appreciably enlarged to the prejudice of other people. Any sensible or appreciable increase is a nuisance, actionable or indictable as such. *Crossley* v. *Lightowler*, L. R., 3 Eq. Cas. 279; L. R., 2 Ch. App. 478. And the fact that the stream is fouled by others is no answer to an action or indictment for the nuisance. Id. And see

Lewis v. *Stein*, 16 Ala. 214; *Hayes* v. *Waldron*, 44 N. H. 585; *Goldsmid* v. *Tunbridge Wells, etc., Co.*, L. R., 1 Ch. App. 349.

And where a large number of persons are mining on a small stream, and each deteriorates the water a little, so that their combined acts render the water utterly unfit for further use, each cannot successfully defend an action on the ground that his act alone did not materially affect the water. *Hill* v. *Smith*, 32 Cal. 166. See *Chipman* v. *Palmer*, 9 Hun (N. Y.), 517; *Thorpe* v. *Brumfitt*, L. R., 8 Ch. App. 650; S. C., 6 Eng. R. 554.

§ 22. **Municipal corporations.** The powers and liabilities of municipal corporations with respect to nuisances have been sufficiently discussed under the title *Municipal Corporations.* It may, however, be observed generally in this connection, that in order to secure and promote the public health, safety, and convenience, municipal corporations are liberally endowed with power to prevent and abate nuisances. And when a municipal corporation, as, for instance, a city, has ample power to remove a nuisance, it is liable for injuries resulting from a failure on its part to keep its streets, lanes and walks free from obstructions, such as steps, fences, posts, or other nuisances existing therein, or dilapidated walls along the street in such a state of decay as to endanger the safety of persons passing along the street. *Coggswell* v. *Lexington*, 4 Cush. 307; *Willard* v. *Newbury*, 22 Vt. 458; *Chamberlain* v. *Enfield*, 43 N. H. 356; *Sweet* v. *Gloversville*, 12 Hun (N. Y.), 302. And the fact that these nuisances are upon private property is no excuse for its failure to remove them, nor any defense against an action for injuries resulting from its neglect. *Parker* v. *Mayor, etc., of Macon*, 39 Ga. 725. See *Hill* v. *Boston*, 122 Mass. 344. Nor has a municipal corporation any more right to erect and maintain a nuisance than a private individual possesses, and an action may be maintained against such corporation for injuries occasioned by a nuisance for which it is responsible, in any case in which, under like circumstances, an action could be maintained against an individual. *Pittsburgh City* v. *Grier*, 22 Penn St. 54; *Donohue* v. *Mayor of New York*, 3 Daly, 65; *Harper* v. *City of Milwaukee*, 30 Wis. 365. A municipal corporation is likewise liable to indictment for a public nuisance maintained by it (*People* v. *Albany*, 11 Wend. 539), or permitted to exist upon its property. *St. John* v. *Mayor*, 3 Bosw. (N. Y.) 483; *Administrator* v. *Insurance Co.*, 1 Disney (Ohio), 336.

§ 23. **Dangerous animals.** See *ante*, Vol. 1, tit. *Animals.* See, also, tit. *Negligence.* A dog *per se* is not a nuisance. *People* v. *Board of Police*, 15 Abb. Pr. (N. Y.) 167. But a ferocious dog, accustomed to bite mankind, is a common nuisance, and if found at large may be

destroyed by any one. Id.; *Brown* v. *Hoburger*, 52 Barb. 15. So, a *mad* dog, or one that is justly suspected of being mad, or that is known to have been bitten by one that was mad, is a nuisance, and may be killed by any person, if at large, or in a situation that is liable to escape. *Woolf* v. *Chalker*, 31 Conn. 121. And see *Jones* v. *Perry*, 2 Esp. 482; *Mason* v. *Keeling*, 12 Mod. 332. And a dog which haunts the premises of another, and by barking and howling becomes a nuisance, if he cannot otherwise be prevented, may be killed. *Brill* v. *Flagler*, 23 Wend. 354.

§ 24. **Miscellaneous.** The erection of a dam across a navigable stream, so constructed as to cause the ice to accumulate in the spring to the injury of adjoining fields, is an actionable nuisance. *Bell* v. *M'Clintock*, 9 Watts (Penn.), 119. So, if a canal constructed by authority of law on the land of A, by his consent, throws back the water of a natural water-course on the land of B, it is an actionable nuisance. *Delaware, etc., Canal Co.* v. *Lee*, 22 N. J. Law, 243. So, the defendant dug a ditch so as to convey the washings from his brewery into a clay pit in the plaintiff's back yard, and this was held to be an actionable nuisance. *Shaw* v. *Cummiskey*, 7 Pick. 76.

To cause a whole neighborhood to become sickly, by erecting a dam across a stream, thus causing the water to stagnate and corrupt the air, is a *public* nuisance, for which an indictment lies. So, also, it is a public nuisance, and indictable, if the pond, without causing sickness, produces smells and stenches, which render the enjoyment of life and property in the community uncomfortable. *State* v. *Rankin*, 3 S. C. 438; S. C., 16 Am. Rep. 737.

A dense smoke laden with cinders, continued for twelve hours twice in each month, falling upon and penetrating houses and premises, at distances varying from forty to two hundred feet, is held to constitute a legal nuisance. *Ross* v. *Butler*, 19 N. J. Eq. 294. So, an action lies against the owner of property who negligently or willfully misuses his own property to the annoyance of his neighbor, by putting up a smoke-pipe in such a manner that the smoke escaping therefrom becomes a nuisance or injury to the occupants of the adjoining premises. *Whalen* v. *Keith*, 35 Mo. 87. So, a cooking range or stove erected so near to the partition wall of two houses as to injure, by its ordinary use, the goods of the adjacent proprietor, and render his house uncomfortable and disagreeable, is a nuisance. *Grady* v. *Wolsner*, 46 Ala. 381; S. C., 7 Am. Rep. 593. And where the roof of a building, in a large city, is so constructed as to render the snow falling upon it liable to be precipitated upon the sidewalk, and there is no adequate guard at the edge to retain it, it is, in judgment of law, a nuisance. *Walsh* v. *Mead*, 8

Hun (N. Y.), 387. See, also, *Shipley* v. *Fifty Associates*, 101 Mass. 251; S. C., 3 Am. Rep. 346.

To turn aside a *useful* element from premises is as much a nuisance as to turn upon them a *destructive* element. In both cases, the injury may be equally material. Thus, a ditch constructed to carry off water, rightfully flowing to a mining claim, is as much a nuisance as a dam to flood the premises. *Parke* v. *Kilham*, 8 Cal. 77.

It is the absolute duty of an occupier of premises, having a lamp overhanging the footway, to prevent its becoming dangerous to the public; and if, in fact, it becomes dangerous, it is a nuisance, and for any injury caused by such nuisance, he is liable. Nor can he shift the liability arising from such a duty from himself by having employed a competent person to repair the lamp. *Tarry* v. *Ashton*, 34 L. T. (N. S.) 97; 24 W. R. 581. And it is the general doctrine that any act of an individual done to a highway, though performed on his own soil, if it detract from the safety of travelers, is a nuisance. *Dygert* v. *Schenck*, 23 Wend. 447. Thus, ejecting a stream of air and dust, through a pipe from the defendant's factory, across the towing-path of a canal, whereby the plaintiff's mules became frightened, and jumped into the canal and were drowned, was held to be a nuisance, for which the defendant was held liable in damages. *Conklin* v. *Phœnix Mills*, 62 Barb. 299. So, if a person makes an excavation in his own ground, adjoining a highway, so that the use of the highway is rendered unsafe to the public, using ordinary care, the person so making the excavation is liable in damages for all the consequences. *Barnes* v. *Ward*, 9 C. B. 392; *Hadley* v. *Taylor*, L. R., 1 C. P. 53; *Vale* v. *Bliss*, 50 Barb. 358. See *ante*, 734, § 4.

A tenement-house, cut up into small apartments, inhabited by a crowd of poor people, in a filthy condition, and calculated to breed disease, is a public nuisance. *Meeker* v. *Van Rensselaer*, 15 Wend. 397. Keeping a large quantity of gun-powder ina wooden building, insufficiently secured and in close proximity to other buildings, is likewise a public nuisance. *Bradley* v. *People*, 56 Barb. 72. So, it is a public nuisance to place on the footway of a public street a stall or stand for the sale of fruit, although the defendant pays rent to the adjoining proprietor. *Commonwealth* v. *Wentworth*, Bright. (Penn.) 318.

A tomb erected upon one's own land is not necessarily a nuisance to his neighbor; but it may become a nuisance from its locality and other extraneous facts. *Barnes* v. *Hathorn*, 54 Me. 124. And see *Begein* v. *Anderson*, 28 Ind. 79; *New Orleans* v. *Wardens*, 11 La. Ann. 244; vol. 2, 132.

So, the trade and occupation of carriage-making, or of a blacksmith,

is a lawful and useful one, and a building erected for its exercise is not a nuisance *per se*. But if such building, though erected on the builder's own land, and occupied in the usual manner, be in an improper place, where its use will probably result to an injury to another, this is, of itself, a wrongful act, for which the wrong-doer is responsible to one essentially injured thereby. *Whitney* v. *Bartholemew*, 21 Conn. 213. And when a railroad authorized by its charter to be made at one place is made at another, it is held to be a mere nuisance on every highway it touches in its illegal course. *Commonwealth* v. *Erie, etc., R. R. Co.*, 27 Penn. St. 339.

ARTICLE III.

WHAT ARE NOT ACTIONABLE NUISANCES.

Section 1. In general. It is a well-established rule that no person can maintain an action for damages from a common nuisance, where the injury and damage are common to all. When the injury is common to the public and special to none, redress must be sought by a criminal prosecution in behalf of all. *Pain* v. *Patrick*, 3 Mod. 289; *Lansing* v. *Smith*, 8 Cow. 146; 4 Wend. 9; *Gordon* v. *Baxter*, 74 N. C. 470. But that which is a public nuisance may be also a private nuisance to a particular individual by inflicting on him some special and peculiar damage; and if it be both, that is, if it be in its nature a public nuisance, and at the same time does inflict on a particular individual a special and particular damage, differing in kind from that sustained by the community in general, that private individual has his remedy by an action at law. *Butterfield* v. *Forrester*, 11 East, 60; *Frink* v. *Lawrence*, 20 Conn. 117; *Brown* v. *Watson*, 47 Me. 161; *Dudley* v. *Kennedy*, 63 id. 465; *Powers* v. *Irish*, 23 Mich. 429; *Cook* v. *Corporation of Bath*, L. R., 6 Eq. Cas. 177; *Soltau* v. *DeHeld*, 9 Eng. Law & Eq. 104; *Benjamin* v. *Storr*, L. R., 9 C. P. 400; 10 Eng. R. 231; *Venard* v. *Cross*, 8 Kan. 248. And no matter how numerous the persons may be who have sustained this peculiar damage, each is entitled to compensation for his injury. *Francis* v. *Schoellkopf*, 53 N. Y. (8 Sick.) 152. But the fact that a person may have suffered more *inconvenience* than others from the nuisance, will not entitle him to maintain an action. See *Stetson* v. *Faxon*, 19 Pick. 147; *Shaubut* v. *St. Paul, etc., R. R. Co.*, 21 Minn. 502. Thus, where the damage alleged by the plaintiff was, that, having gone to F., by the highway, as he was returning home, he met an obstruction, a fence, placed across the highway by the defendant and was withheld by him from removing it, and was, in consequence,

"obliged to proceed to his farm by a very circuitous route to his loss and detriment," it was held, that this was insufficient to maintain the action. *Houck* v. *Wachter*, 34 Md. 265; S. C., 6 Am. Rep. 332. And see *Winterbottom* v. *Lord Derby*, L. R., 2 Exch. 316. But see *Brown* v. *Watson*, 47 Me. 161. So, a claim for damages arising from one's not attempting, at certain times, to travel a public highway, because of its general bad condition, is hypothetical, and does not constitute such peculiar damage, as to give a private action for a public nuisance. *Baxter* v. *Winooski Turnpike Co.*, 22 Vt. 114. See, also, *Greasly* v. *Codling*, 2 Bing. 263; *Rose* v. *Miles*, 4 Maule & Selw. 101. But proof that the plaintiff is deprived of free access to his premises by reason of an obstruction in the highway, is sufficient to maintain the action. *Blane* v. *Klumpke*, 29 Cal. 156; *Schulte* v. *North Pacific Transp. Co.*, 50 id. 592.

And the fact that offal from a distillery pollutes the air and a stream, to the injury of the whole neighborhood, does not affect an individual's right of action for special damage as to watering his cattle, and keeping his tavern. *Greene* v. *Nunnemacher*, 36 Wis. 50.

In *Blackwell* v. *Old Colony R. R. Co.*, 122 Mass. 1, it is held that no action can be maintained to recover damages for the obstruction of a navigable stream by the building of a bridge across the stream, whereby the owner of a parcel of land and a wharf above the bridge is prevented from coming to the wharf from the sea in vessels, although his wharf is the only one above the bridge used for business purposes, and he is thereby compelled to abandon the use of his wharf for such purposes, and to transport his goods by land at an enhanced expense. And see *Brayton* v. *Fall River*, 113 Mass. 218; S. C., 18 Am. Rep. 470; *Brightman* v. *Fairhaven*, 7 Gray, 271.

ARTICLE IV.

WHO MAY OR MAY NOT SUE FOR.

Section 1. Who may sue. In general, every person who suffers actual damage, whether direct or consequential, from a common nuisance, may sue for his own particular injury. See preceding section. Thus, any person interested in the use and enjoyment of the water of a running stream is entitled to receive it pure and uncontaminated; and he may sue for any special injury sustained by him in consequence of the corruption of the water by any other person. *Carhart* v. *Auburn Gas Light Co.*, 22 Barb. 297. And see *Hamilton* v. *Mayor, etc., of Columbus*, 52 Ga. 435; *Clark* v. *Peckham*, 10 R. I. 35; 14 Am.

Rep. 654; *Grant* v. *Schmidt*, 22 Minn. 1. And an action for nuisance may be brought by the *successive* owners and occupants of the place subject to the nuisance. *Staple* v. *Spring*, 10 Mass. 72.

Where a landlord has leased a house, and a nuisance was erected so near thereto as to injure the house, a recovery for the damage occasioned thereby to the reversion may be had by the landlord; but if it is not permanent and injurious to the reversion, he cannot recover. *Cooper* v. *Randall*, 59 Ill. 318. Where a reversioner sues for injury to the freehold, he must be restricted to damages to the reversionary interest, and it would be error to give an instruction which would authorize a verdict for all damages sustained, as well by the tenant in possession as the landlord. Each has his remedy, the former for injury to his possession, the latter for injury to his reversion. Id ; *Bedingfield* v. *Onslow*, 3 Lev. 209. And see *Baxter* v. *Taylor*, 4 B. & Ad. 72. A reversioner may maintain an action for the obstruction of an ancient light, and, in the event of its not being removed, for the continuance thereof. *Shadwell* v. *Hutchinson*, 2 B. & Ad. 97. So, he may maintain an action for the permanent obstruction of a right of way. *Kidgill* v. *Moor*, 9 C. B. 364. See *Simpson* v. *Savage*, 1 C. B. (N. S.) 347.

Where it appeared that the grantee of a disseisor was maintaining, on land of which he was wrongfully seized, an embankment so as to flood other land of the disseisee, it was held that the disseisee might maintain an action on the case for the nuisance. *Fifield* v. *Bailey*, 55 N. H. 380.

One who is the owner of medical springs and uses them as a source of revenue, by furnishing houses, board, lodging, and entertainment to those who resort to them, is entitled to sue in that character for damage done to him, in the construction of a nuisance by which the public are deterred from visiting his springs, and his profits are thereby reduced. *Bonner* v. *Welborn*, 7 Ga. 296.

§ 2. **Who cannot sue.** Where a nuisance was created near a house whereby the house was made unwholesome and the tenant's wife sick, it was held, that although the tenant had a right of action therefor, and could recover damages for the injury to the wife's health, yet such action accrued to him solely as occupier of the house, and, therefore, that after his death the wife could maintain no action. *Ellis* v. *Kansas City, etc., R. R. Co.*, 63 Mo. 131; S. C., 21 Am. Rep. 436.

And although it is well settled that if a public nuisance work a private injury to a person, that person may have a remedy by private action for damages, and in a proper case may have an injunction (See *ante*, 767, art. 3, § 1); yet an individual citizen cannot maintain an action

to restrain another individual by injunction from an act alleged to be a public nuisance, where he suffers injury only in common with other citizens (*Bigelow* v. *Hartford Bridge Co.*, 14 Conn. 565); nor can such an action be sustained for the purpose of restraining the usurpation of a franchise detrimental to all the people of the State; namely, the filling up of a navigable river or public highway. *Manhattan Gas Light Co.* v. *Barker*, 7 Robt. (N. Y.) 523; S. C., 36 How. 233. And where a man lies by and permits another to erect works at great expense and to use them for several years without objection, he cannot come into equity for an injunction to restrain the use of such works in the same manner as they have been before used. *Southard* v. *Morris Canal*, 1 N. J. Eq. 518. See Vol. 3, tit. *Injunction.*

The owner of a house occupied by weekly tenants is within the rule that a reversioner cannot maintain an action in respect of a temporary nuisance. *Jones* v. *Chappell*, L. R., 20 Eq. Cas. 539; S. C., 15 Eng. R. 475. So, the noise and obstruction occasioned by the loading and unloading of carts in a public highway or street opposite to a dwelling-house (in the absence of evidence showing an intention to make the nuisance permanent), is held to be not such an injury to the dwelling-house as to entitle the owner of the same in reversion on a lease, to an injunction against the nuisance. *Mott* v. *Shoolbred*, L. R., 20 Eq. Cas. 22; S. C., 13 Eng. R. 582.

ARTICLE V.

WHO MAY OR WHO MAY NOT BE SUED.

Section 1. Who may be sued. In general, an action on the case lies against one erecting a nuisance and one continuing a nuisance erected by another. *Plumer* v. *Harper*, 3 N. H. 88; *Kansas Pacific Railway* v. *Mihlman*, 17 Kans. 224; *Staple* v. *Spring*, 10 Mass. 72. And a person who erects a nuisance continues liable, although he has subsequently parted with his whole interest in it. *Dorman* v. *Ames*, 12 Minn. 451; *Grady* v. *Wolsner*, 46 Ala. 381; S. C., 7 Am. Rep. 593; *Waggoner* v. *Jermaine*, 3 Denio, 306. See *Brown* v. *Woodworth*, 5 Barb. 550; *Cobb* v. *Smith*, 38 Wis. 21. Generally, the *creator* of a private nuisance is liable to any person he may injure, without notice to desist from the wrong, or request to repair the injury (*Crommelin* v. *Coxe*, 30 Ala. 318; *Pierson* v. *Glean*, 14 N. J. Law, 36; *Pillsbury* v. *Moore*, 44 Me. 154); but the continuer of a nuisance created by another is not liable for damages unless it be shown that he had notice or knowledge of the existence of the nuisance (*Pinney* v.

Berry, 61 Mo. 359; *Conhocton Stone Road* v. *Buffalo, etc., R. R. Co.*, 51 N. Y. (6 Sick.) 573; S. C., 10 Am. Rep. 646); though it is not necessary to prove a request to abate it. Id. But on this point, see *McDonough* v. *Gilman*, 3 Allen, 264; *Ray* v. *Sellers*, 1 Duv. (Ky.) 254; *Pillsbury* v. *Moore*, 44 Me. 154; *West* v. *Louisville, etc., R. R. Co.*, 8 Bush (Ky.), 404; *Grigsby* v. *Clear Lake Water Co.*, 40 Cal. 396.

Parties who cause a nuisance, by acts done on the land of a stranger, are liable for its continuance, and it is no defense that they cannot lawfully enter to abate the nuisance without rendering themselves liable to an action by the owner of the land. *Smith* v. *Elliott*, 9 Penn. St. 345. And an action on the case lies against all jointly who are concerned in the continuance of a nuisance, whether lessees, sub-lessees or assignees of lessor. *Rogers* v. *Stewart*, 5 Vt. 215.

An action lies against the owner of premises who lets them to a tenant in a ruinous and dangerous condition, and who causes or permits them so to remain until, by reason of the want of reparation, they fall upon and injure the house of an adjoining owner. *Todd* v. *Flight*, 9 C. B. (N. S.) 377. So, the defendant, being the owner of land on which was a kiln for drying lumber, leased the same, knowing that the kiln would be used by the lessee for drying lumber, and knowing, or having reason to know, that such use would be dangerous to the plaintiff's adjoining property, and it was held that the defendant was liable to the plaintiff for injuries occasioned to his adjoining property by the kiln. *Helwig* v. *Jordan*, 53 Ind. 21; S. C., 21 Am. Rep. 189. See, also, *Fish* v. *Dodge*, 4 Denio, 311; *Durant* v. *Palmer*, 29 N. J. Law, 544; *Owings* v. *Jones*, 9 Md. 108. So, if a person erect a barn on land immediately adjoining another's in such manner that in its ordinary use it would be injurious and offensive to the adjoining proprietor, and cast unwholesome odors into his house, he is liable for the nuisance, though caused by tenants to whom he has leased the premises (*Pickard* v. *Collins*, 23 Barb. 444); but for a nuisance arising to the adjoining proprietor by reason of some special unusual circumstances, he will not be liable, unless he knew, or had reason to believe when he let the barn, that the use of it, in the ordinary mode, would prove a nuisance. Id. And where a landlord lets premises not in themselves a nuisance, but which may or may not be used by the tenant so as to become a nuisance, and it is entirely at the option of the tenant so to use them or not, and the landlord receives the same benefit whether they are so used or not, the landlord is not responsible for the acts of the tenant. *Rich* v. *Basterfield*, 4 C. B. 804. See *Gandy* v. *Jubber*, 5 B. & S. 78; S. C., Id. 485.

A landlord who lets premises, knowing they are infected by a contagious disease, without notifying the tenant thereof, is held liable to the latter, for the damages sustained, in case the disease is communicated. *Cesar* v. *Karutz*, 60 N. Y. (15 Sick.) 229; S. C., 19 Am. Rep. 164; *Minor* v. *Sharon*, 112 Mass. 477; S. C., 17 Am. Rep. 122. See, also, *Eaton* v. *Winne*, 20 Mich. 156; S. C., 4 Am. Rep. 377. And in general, where the landlord knows that a cause exists which renders the house unfit for occupation, it is a wrongful act on his part to rent it without giving notice of its condition. *Wallace* v. *Lent*, 29 How. (N. Y.) 289; S. C., 1 Daly, 481; *Staples* v. *Anderson*, 3 Robt. (N. Y.) 327. So, an action lies against the landlord of a house demised by lease, who, under his contract with his tenants, himself employs workmen to repair the house, for a nuisance in the house occasioned by the negligence of his workmen. *Sadler* v. *Henlock*, 4 El. & Bl. 570; *Leslie* v. *Pounds*, 4 Taunt. 649; 2 Selw. N. P. 1084.

And when the owner of lands undertakes to do a work which, in the ordinary mode of doing it, is a nuisance, he is liable for any injury which may result from it to third persons, though the work is done by a contractor exercising an independent employment, and employing his own servants. *Ellis* v. *Sheffield Gas Co.*, 2 El. & Bl. 767; *Pickard* v. *Smith*, 10 C. B. (N. S.) 470, 480; *Coe* v. *Wise*, L. R., 1 Q. B. 711; *Butler* v. *Hunter*, 7 Hurlst. & N. 826; *Scammon* v. *City of Chicago*, 25 Ill. 424; *Cuff* v. *Newark, etc., R. R. Co.*, 35 N. J. Law, 17; S. C., 10 Am. Rep. 205. But when the work is not in itself a nuisance, and the injury results from the negligence of such contractor or his servants in the manner of executing it, the contractor alone is liable, unless the owner is in default in employing an unskillful or improper person as the contractor. Id.

In *Walter* v. *Wicomico County*, 35 Md. 385, it is held that a failure to remove a nuisance, erected by another, does not alone constitute a continuance of it, but that there must be some positive act done evidencing its adoption.

So, in order to charge one who has created a nuisance with liability for its continuance, after he has parted with the property upon which it is situated or caused, it is held that he must be shown to derive some benefit from the continuance, or to have sold with warranty of the continued use of the property, as enjoyed while the nuisance existed. *Hanse* v. *Cowing*, 1 Lans. (N. Y.) 288; *Walsh* v. *Mead*, 8 Hun (N. Y.), 386; *Rich* v. *Basterfield*, 4 C. B. 804; *James* v. *Harris*, 35 L. T. (N. S.) 240; *Swords* v. *Edgar*, 59 N. Y. (14 Sick.) 28; S. C., 17 Am. Rep. 295. See *Pretty* v. *Brickmore*, L. R., 8 C. P. 401; 6 Eng. Rep. 182; *Leonard* v. *Storer*, 115 Mass. 86; S. C., 15 Am. Rep. 76.

Under the Revised Statutes of Rhode Island, an action on the case for causing a nuisance survives the death of the defendant and may proceed against his executor, cited in to defend. *Aldrich* v. *Howard*, 8 R. I. 125.

The occupier of a house is held liable for allowing the continuance on his premises of any artificial work which causes a nuisance to a neighbor, even though it has been put there before he took possession. *Broder* v. *Saillard*, L. R., 2 Ch. Div. 692; 17 Eng. Rep 693.

So where the occupier of lands grants a license to another to do certain acts on the land, and the licensee in doing them commits a nuisance, the occupier may be made a defendant to a suit to restrain the nuisance. *White* v. *Jameson*, L. R., 18 Eq. 303; S. C., 9 Eng. Rep. 817.

ARTICLE VI.

REMEDY IN EQUITY.

Section 1. In general. The remedy in equity for nuisances is by injunction. See, as to the rules governing the application of this remedy to nuisances, *ante*, Vol. 3, title *Injunctions*, p. –, *et seq.* In general, where the injury arising from the nuisance is not susceptible of adequate compensation in damages, or where the injury is a constantly recurring grievance, a court of equity will interpose the remedy by injunction. *Arnold* v. *Klepper*, 24 Mo. 273; *Carlisle* v. *Cooper*, 21 N. J. Eq. 576; *McCord* v. *Iker*, 12 Ohio, 387; *Corning* v. *Troy Iron and Nail Factory*, 40 N. Y. (1 Hand) 191; *Swaine* v. *Great Northern Railway Co.*, 4 DeG. J. & S. 211. Or, if a clear legal right is injured, and its destruction threatened, courts of equity will interpose. *Walker* v. *Brewster*, L. R., 5 Eq. Cas. 25; *Herz* v. *Union Bank of London*, 2 Giff. 686; *Wilts, etc., Co.* v. *Swindon, etc., Co.*, L. R., 9 Ch. App. 451; S. C., 9 Eng. R. 546. And it is held that a court of equity will sometimes even grant relief, where there has been an adverse decision in a court of law. But such cases are rare, and rest upon very peculiar grounds. *Ollendorf* v. *Black*, 4 DeG. & S. 211. So, although it is now settled that an injunction may be granted to restrain apprehended mischief from the storing of highly explosive and inflammable substances in populous places, where the fears of mankind are *reasonable*. See *Hepburn* v. *Lordon*, 2 H. & M. 345; S. C., 11 Jur. (N. S.) 132. Yet, it requires an extraordinary case to warrant the remedy, and the danger should be probable rather than possible. Id.; *Rhodes* v. *Dunbar*, 57 Penn. St. 274; *Wier's Appeal*, 74 id. 230.

Digging deep holes, and planting therein large stone pillars or abutments; digging and carrying away large banks of valuable clay, and constructing an aqueduct by ditches and embankments through and thus permanently dividing the complainant's land, are acts which, if done without authority of law, would present a case of irreparable damage, authorizing the interference of a court of equity by injunction. *Reddall* v. *Bryan*, 14 Md. 444. So, a court of equity has power to prohibit by injunction the obstruction of water-courses, the diversion of streams from mills, the back flowage upon them, and injuries of the like kind, which, from their nature, cannot be adequately compensated by damages at law. *Lamborn* v. *Covington Manuf. Co.*, 2 Md. Ch. 409; *Hough* v. *Doylestown*, 4 Brewst. (Penn.) 333; *Burnham* v. *Kempton*, 44 N. H. 78; *Webb* v. *Portland Manuf. Co.*, 3 Sumn. (C. C.) 189; *Bemis* v. *Upham*, 13 Pick. 169; *McGenness* v. *Adriatic Mills*, 116 Mass. 177. And where the defendant was about erecting a privy on his own lot, in close proximity to the dwelling-house, cellar, and well of the complainant, it was held that the remedy by injunction would lie to restrain the completion of the privy, there being no adequate remedy at law for the injury that would result therefrom to the complainant. *Wahle* v. *Reinbach*, 76 Ill. 322.

An injunction will likewise be issued to prevent a party from burning bituminous coal for generating steam in his mill, so near to dwellings as to cover them with soot and noxious vapors (*Galbraith* v. *Oliver*, 3 Pittsb. [Penn.] 78); or to restrain the erection of stock pens so near dwellings or places of business as to impair their comfortable enjoyment by foul odors and stenches (*Illinois Central R. R. Co.* v. *Grabill*, 50 Ill. 241); or to restrain the erection of machine shops in a locality where the noise therefrom becomes a nuisance to residents (*Cooper* v. *North Brit. Railway Co.*, 27 Jur. 241); or to restrain a bone burning establishment (*Meigs* v. *Lister*, 23 N. J. Eq. 199); and this, notwithstanding the objection that the odors complained of were not unwholesome, but merely unpleasant, and that the maintenance of the establishment, as a means of disposing of refuse animal matter accumulating in a neighboring city, was necessary to the welfare of that city. Id. So, the erection of a bridge over a stream producing special damage to one navigating the stream skillfully (*Columbus Ins. Co.* v. *Curtenius*, 6 McLean [C. C.], 209), or the section of a railroad or other obstruction along a public street, so as to cut off access to the premises of one who is the owner of the fee (*Fort* v. *Groves*, 29 Md. 188; *Black* v. *Philadelphia, etc., R. R. Co.*, 58 Penn. St. 249), may be restrained by injunction. Id. See *Aram* v. *Schallenberger*, 41 Cal. 449. So, if it clearly appears that a cemetery is so situated that the burial of the dead

there will endanger life or health, either by corrupting the surrounding atmosphere, or the water of wells or springs, a court of equity will grant injunctive relief. *Clark* v. *Lawrence*, 6 Jones' (N. C.) Eq. 83. And see *Ellison* v. *Commissioners*, 5 id. 57. Vol. 2, 132.

Courts of equity will rarely exercise their jurisdiction in cases of *public* nuisance. The proper remedy in such cases is by indictment, and where the object sought can be attained in that mode, equity will not interfere. *Att.-Gen.* v. *New Jersey R. R., etc., Co.*, 3 N. J. Eq. 136. And see *Water Commissioners* v. *Hudson*, 13 id. 420; *Gray* v. *Ohio, etc., R. R. Co.*, 1 Grant's (Penn.) Cas. 412. But an injunction will be allowed to restrain a public nuisance which causes special damage to the property of individuals; as for instance, to restrain the owner of an adjoining house from its contemplated use as a brothel. *Hamilton* v. *Whitridge*, 11 Md. 128. And see *Hayden* v. *Tucker*, 37 Mo. 214; *Remington* v. *Foster*, 42 Wis. 608.

If the injury be doubtful, eventual or contingent, or if the matter complained of is not *ipso facto* a nuisance, or will not become such when put in operation, an injunction will not be granted (*Rhodes* v. *Dunbar*, 57 Penn. St. 274; *Weir's Appeal*, 74 id. 230; *Butler* v. *Rogers*, 1 Stockt. [N. J.] 487; *Dumesnil* v. *Dupont*, 18 B. Monr. [Ky.] 800); and it lies upon the plaintiff to establish his case by satisfactory proof which does not consist of the opinions of witnesses. *Hough* v. *Doylestown*, 4 Brewst. (Penn.) 333.

In *Village of St. Johns* v. *McFarlan*, 33 Mich. 72; S. C., 20 Am. Rep. 671, it is held that a court of equity has no jurisdiction to restrain the threatened violation of a village ordinance, unless the act threatened to be done would, if carried out, be a nuisance; and that the erection of a wooden building within the limits of a city or village is not in and of itself a nuisance, nor does the fact that it is prohibited by ordinance make it such. See, also, *Pye* v. *Peterson*, 45 Tex. 312; *Mayor of Hudson* v. *Thorne*, 7 Paige 261.

Where water pipes had, without the consent of the owner of the soil, been laid in the soil of a highway, an injunction to restrain the continuance of the pipes was granted; and the fact that the soil under the highway was of no value to the owner, and that his motive for applying to the court was not connected with the enjoyment of his land, was held to constitute no reason against granting the injunction. *Goodson* v. *Richardson*, L. R., 9 Ch. App. 221; S. C., 8 Eng. R. 835.

ARTICLE VII.

REMEDY AT LAW.

Section 1. In general. The legal remedies for nuisances are,—an action on the case for the recovery of damages resulting from the nuisance; abatement of the nuisance by the party injured; and the remedy by indictment, on behalf of the public. See, as to the cases in which an action may be maintained for injuries received from a common nuisance, *ante*, 767, art. 3, § 1. As to parties, see *ante*, 768, 770, arts. 4 and 5.

Where the injury complained of affects the *comfortable enjoyment* of property, the tenant may maintain an action in his own name. *Mumford* v. *Oxford, etc., R. R. Co.*, 1 H. & N. 35; *Simpson* v. *Savage*, 1 C. B. (N. S.) 347. If the nuisance is of a *permanent* character, or produces a permanent injury to the estate, the reversioner may maintain an action therefor. Id.; *Tucker* v. *Newman*, 11 Ad. & El. 40; *Codman* v. *Evans*, 7 Allen, 431; *Schulte* v. *North Pacific Transp. Co.*, 50 Cal. 592; *Seeley* v. *Alden*, 61 Penn. St. 302.

It is a well-settled doctrine that every *continuance* of a nuisance is a new nuisance, and entitles the party injured thereby to sue for damages. *Vedder* v. *Vedder*, 1 Denio, 257; *Staple* v. *Spring*, 10 Mass. 74; *Clowes* v. *Staffordshire Potteries, etc., Co.*, L. R., 8 Ch. App. 125; S. C., 4 Eng. R. 807. Thus, a recovery in an action for changing the channel of a creek and diverting the water thereof by means of obstructions, so as to flow the plaintiff's lands, is held to be no bar to a subsequent suit to recover damages for a similar injury sustained since the commencement of the former suit. *Beckwith* v. *Griswold*, 29 Barb. 291. And the abatement of a nuisance by the plaintiff does not preclude him from recovering damages sustained anterior to such abatement. *Gleason* v. *Gary*, 4 Conn. 418; *Tate* v. *Parrish*, 7 Monr. (Ky.) 325; *Crump* v. *Lambert*, 13 L. T. (N. S.) 133; affirming S. C., L. R., 3 Eq. 409.

§ 2. **Damages recoverable.** In an action for a nuisance the general rule is, that the plaintiff's measure of damages is the loss actually sustained. *Thayer* v. *Brocks*, 17 Ohio, 489; *Luther* v. *Winnisimmet Co.*, 9 Cush. 171. Suits for damages should not be matters of speculation, but reasonable claims for indemnification. One who, therefore, in the exercise of what he believes to be his rights, commits a nuisance against the property of another, is bound only for the actual damages suffered, including the trouble and expense of establishing the right to have the nuisance abated. *Keay* v. *New Orleans Canal Co.*, 7 La.

Ann. 259. See, also, *McKnight* v. *Ratcliff*, 44 Penn. St. 156; *Shaw* v. *Cummiskey*, 7 Pick. 76. But if the nuisance be continued after a verdict at law establishing the nuisance, *exemplary* damages are warrantable to such an extent as will lead to the abatement of the nuisance. *Bradley* v. *Amis*, 2 Hayw. (N. C.) 399; *Soltau* v. *DeHeld*, 9 Eng. Law & Eq. 104. See *Morford* v. *Woodworth*, 7 Ind. 83. And a man may not, with impunity, invade the premises of another simply because the damage may not be *appreciable*. The law permits the recovery of nominal damages at least, as evidence of the plaintiff's right. *Casebeer* v. *Mowry*, 55 Penn. St. 419; *Cory* v. *Silcox*, 6 Ind. 39; *Paul* v. *Slason*, 2 Vt. 2231; vol. 1, 148.

As it respects injuries to real estate, the rule of damages is stated to be the difference between the value of the plaintiff's premises before the injury and the value immediately after the injury. See 1 Hill. on Torts, 608, § 18 a; *Ruckman* v. *Green*, 9 Hun (N. Y.), 225; *Seely* v. *Alden*, 61 Penn. St. 302. But this rule is held to have no application to such nuisances as may be removed directly after the verdict, or for the continuance of which a second or third action may be maintained, or which may be abated by the order of the court. In such cases, a proper criterion by which to estimate the damages is the loss in the rental value of the property, sustained by the continuance of the nuisance. *Pinney* v. *Berry*, 61 Mo. 359; *Park* v. *C. & S. W. R. Co.*, 43 Iowa, 636; *Chipman* v. *Palmer*, 9 Hun (N. Y.), 517. And evidence that, in consequence of the number of persons employed in the business creating the nuisance, the commercial and rental value of the injured premises is enhanced, is not proper in reduction of damages. *Francis* v. *Schoellkopf*, 53 N. Y. (8 Sick.) 152. And see *Kimel* v. *Kimel*, 4 Jones (N. C.), 121.

Where the damages are in their nature permanent, and go to the entire value of the estate affected by the nuisance, the whole injury may be at once compensated. But if it be uncertain or contingent whether further or other injury may result, there can be a recovery for the damage sustained only at the commencement of the suit. Thus, one who so managed the water he uses for his mills, as to wash away the soil of his neighbor, is liable at once for all the injury occasioned by its removal, because it is, in its nature, a permanent injury; but if his works are so constructed, that upon the recurrence of a similar freshet, the water will probably wash away more of the land, for this there can be no recovery, until the damage has actually arisen, because it is yet contingent, whether any such damage will ever arise. *Town of Troy* v. *Cheshire R. R. Co.*, 23 N. H. 83; *Plumer* v. *Harper*, 3 id. 88; *Anonymous*, 4 Dall. (U. S.) 147; *Thayer* v. *Brooks*, 17 Ohio

489; *Blunt* v. *McCormick*, 3 Denio, 283. See *Cumberland, etc., Co.* v. *Hitchings*, 65 Me. 140.

The true rule of damages in an action on the case, brought by a reversioner on account of an injury done to the premises, is the amount of the injury done to the estate as a reversion. *Dutro* v. *Wilson*, 4 Ohio St. 101. See *Hamer* v. *Knowles*, 6 Hurlst. & N. 454; *Bathishill* v. *Read*, 37 Eng. Law & Eq. 317.

In an action on the case against a railroad company for an injury to a house and lot in a town, by the construction of a railroad cut, in the street opposite, it was held to be competent to show that the rental value of the property was thereby diminished; but that it was not competent to show that the rent of other property, similarly situated, belonging to third persons, was diminished by the same cause. *Selma, etc., R. R. Co.* v. *Knapp*, 42 Ala. 480. See *ante*, Vol. 2, title *Damages*.

ARTICLE VIII.

ABATEMENT BY INDIVIDUALS.

Section 1. In general. It has been held that any person in the community may abate a public nuisance although it causes him no immediate danger. *Gunter* v. *Geary*, 1 Cal. 462; *Lancaster Turnpike Co.* v. *Rogers*, 2 Penn. St. 114. But it is the better doctrine that a private individual cannot abate a public nuisance, any more than he can maintain a private action on account of it, unless it be specially injurious to him, and its abatement necessary to enable him to exercise his rights. *State* v. *Keeran*, 5 R. I. 497; *Cosby* v. *Owensboro, etc., R. R. Co.*, 10 Bush (Ky.), 288; *Brown* v. *Perkins*, 12 Gray, 89; *Griffith* v. *McCullum*, 46 Barb. 561; *Morris* v. *Nugent*, 7 Carr. & P. 572; *Dimes* v. *Petley*, 15 Q. B. 276. Thus, a house kept as a house of ill-fame and as a resort for thieves and other disreputable persons, is a common and public nuisance; but no person has a right to abate such nuisance by demolishing the building. *Barclay* v. *Commonwealth*, 25 Penn. St. 503; *Welch* v. *Stowell*, 2 Dougl. (Mich.) 332; *Ely* v. *Niagara County*, 36 N. Y. (9 Tiff.) 2[illegible]7; *Gray* v. *Ayres*, 7 Dana (Ky.), 375. And see *Chenango Bridge* v. *Lewis*, 63 Barb. 111. So, it is fully established by the recent cases that, if there be a nuisance in the public highway, a private individual cannot of his own authority abate it, unless it does him a special injury, and he can only interfere with it so far as is necessary to exercise his right of passing along the highway, and he cannot justify doing any damage to the property of the

person who has improperly placed the nuisance in the highway, if avoiding it, he might have passed on with reasonable convenience. See *Dimes* v. *Pently*, 15 Q. B. 276; *Goldsmith* v. *Jones*, 43 How. (N. Y.) 415; *Cobb* v. *Bennett*, 75 Penn. St. 326; S. C., 15 Am. Rep. 752; *Blanc* v. *Klumpke*, 29 Cal. 156. But any individual may remove an unlawful obstruction from a public way, when he has occasion to use it in a lawful manner, and he may enter upon the land of the party erecting or continuing the nuisance, for the purpose of removing it, doing as little damage as possible to soil or buildings. *Arundel* v. *M'Culloch*, 10 Mass. 70. As it respects the abatement thereof, it is important for the sake of the public peace and to prevent oppression, even on wrong-doers, not to confound common with private nuisances. In the case of private nuisances, the individual aggrieved may abate it, if such abatement involves no breach of the peace, and a public nuisance becomes a private one to him who is specially and in some particular way inconvenienced thereby, as in the case of a gate across a highway, which prevents a traveler from passing, and which he may therefore throw down; but the ordinary remedy for a public nuisance is by indictment, and each individual, who is only injured as one of the public, can no more proceed to abate than he can bring an action. *Mayor of Colchester* v. *Brooke*, 7 Q. B. 339; *Griffith* v. *McCullum*, 46 Barb. 561; *City of McGregor* v. *Boyle*, 34 Iowa, 268; *Clark* v. *Lake St. Clair, etc., Ice Co.*, 24 Mich. 508.

Even the worthless and decayed condition of a public bridge, erected by authority of law, or the peril attending its crossing, will not authorize its destruction or injury by one not suffering particular annoyance or injury. *Owens* v. *State*, 52 Ala. 400. But if a public bridge, in its original construction and condition, materially impedes the free navigation on a stream which is a public highway, that fact may be shown in defense by a person who destroys the bridge to allow a passage for his raft. Id. So, in *State* v. *Parrott*, 71 N. C. 311; S. C., 17 Am. Rep. 5, the defendants were held to be guilty of no offense in tearing down a portion of the railroad bridge over a navigable river, when by so doing they were removing obstructions to the free navigation of such river with their boats. See, also, *State* v. *Dibble*, 4 Jones' (N. C.) L. 107; *Hicks* v. *Dorn*, 42 N. Y. (3 Hand) 47; S. C., 9 Abb. (N. S.) 47; affirming S. C., 54 Barb. 172; S. C., 1 Lans. 81. But, in abating a nuisance, no more injury must be done to the property than is absolutely necessary to effect the object. Id.; *State* v. *Moffett*, 1 Greene (Iowa), 247; *Heath* v. *Williams*, 25 Me. 209.

If a dam be erected across a stream, so as to pen back the water and flood the lands of a riparian proprietor above, he may abate the portion

of the dam which produces the injury to his land, and an entry for such purpose upon the premises of the owner below is justifiable. *Roberts* v. *Rose*, L. R., 1 Exch. 82; *Adams* v. *Barney*, 25 Vt. 225. Where, however, a nuisance is occasioned by the pollution of a pond of water, one injured thereby has not the right to fill up the bed of the water, but he may remove the cause rendering the water impure, or he may restrain the party whose acts produce that result. *Finley* v. *Hershey*, 41 Iowa, 199.

To render a business liable to be abated as a nuisance, it must be offensive, unhealthful, etc., to persons of ordinary nature and condition, and it is not enough that it is offensive merely to delicate and sensitive organizations. Thus, the use of a warehouse for storing *guano* in the ordinary manner cannot be abated, upon showing merely that individual members of the complainant's family were nauseated by the odors from it. *Ruff* v. *Phillips*, 50 Ga. 130. And see *Meigs* v. *Lister*, 25 N. J. Eq. 489.

It is held to be neither a cruel nor an unusual punishment to adjudge the abatement. *McLaughlin* v. *State*, 45 Ind. 338. And the destruction of property constituting a common-law nuisance, when committed for the public safety or health, is not a taking of private property for public use, without compensation or due process of law, in the sense of the Constitution. *Manhattan Munuf., etc., Co.* v. *Van Keuren*, 23 N. J. Eq. 251. But a power given to a municipal body to abate nuisances in any manner it may deem expedient is not unlimited, but such means only are authorized as are necessary for the public good; and no wanton or unnecessary injury to the property or rights of individuals must be committed. *Babcock* v. *City of Buffalo*, 56 N. Y. (11 Sick.) 268.

And it is held that the board of health of a city, in the legitimate exercise of its powers, cannot absolutely prohibit the carrying on of a lawful business, not necessarily a nuisance, but which may be conducted without injury or danger to the public health, and without public inconvenience. They will be confined in their interference with the lawful business of any individual, to such interruptions as may be reasonably necessary to enable them to abate any nuisance he may create in conducting it. *Weil* v. *Ricord*, 24 N. J. Eq. 169. See *City of Salem* v. *Eastern R. R. Co.*, 98 Mass. 431.

If a house is occupied, although it has itself become a nuisance, it cannot be abated except under very extraordinary circumstances. *Perry* v. *Fitzhowe*, 8 Ad. & El. (N. S.) 757; *Rex* v. *Rosewell*, 2 Salk. 459. But an *unoccupied* house, which has become a nuisance to owners of adjoining property, may be abated by any person who is injured

thereby. *Harvey* v. *Dewoody*, 18 Ark. 252. And where a house obstructs the exercise of a right of common, the commoner may, after notice and request to remove the house, pull it down, although it be actually inhabited at the time. *Davies* v. *Williams*, 16 Ad. & El. (N. S.) 546. So, a dwelling-house, divided into small apartments and thickly inhabited, is a nuisance during the prevalence of the cholera, and may be abated by persons residing in the neighborhood. *Meeker* v. *Van Rensselaer*, 15 Wend. 397. And erecting a building on a public square is a public nuisance, and may be abated by any one aggrieved thereby. *Rung* v. *Shoneberger*, 2 Watts (Penn.), 23. See *Brightman* v. *Bristol*, 65 Me. 426; S. C., 20 Am. Rep. 711. And a boat, lying in a navigable stream in such a position as to obstruct the passage of other boats, may be lawfully moved by any means, as a common and public nuisance. *King* v. *Sanders*, 2 Brev. (S. C.) 111. And see *ante*, Vol. 1, 60, *et seq.* But a citizen has no right to abate a public nuisance, if such abatement involve a breach of the peace. *Day* v. *Day*, 4 Md. 262.

ARTICLE IX.

DEFENSES.

Section 1. In general. The only defense to an action on the case for a nuisance is the right to do the act complained of, acquired by grant, prescription, or by license. It is no defense to an action brought by one, who has sustained damage, peculiar to himself, from a common nuisance, that a like injury has been sustained by numerous others. *Francis* v. *Schoellkopf*, 53 N. Y. (8 Sick.) 152. Nor can the existence of a nuisance be justified or its continuance be demanded by establishing that similar nuisances have been permitted. *People* v. *Mallory*, 4 N. Y. Sup. Ct. (T. & C.) 567; S. C., 2 Hun, 381; *Robinson* v. *Baugh*, 31 Mich. 290. Nor is it a defense that the business occasioning the nuisance is lawful (*Fletcher* v. *Ryland*, L. R., 1 Exch. 263), or is necessary to be carried on and useful to the public (*Beardmore* v. *Tredwell*, 3 Griff. 683), or that it is really a benefit to the plaintiff's property. *Francis* v. *Schoellkopf*, 53 N. Y. (8 Sick.) 152. Nor is it a defense that the plaintiff, who was a lessee, rented the premises injured by the nuisance after the business occasioning the nuisance had been established, and with knowledge of its existence and for a smaller rent on that account. *Smith* v. *Phillips*, 8 Phil. (Penn.) 10. And in a prosecution for nuisance, the defendant will not be permitted to show in justification that the public benefit resulting from his acts is equal to the public inconvenience. *State* v. *Kaster*, 35 Iowa, 221. So, the

fact that the nuisance was caused by the acts of the agent or servant of the defendant, and without the knowledge of the latter, is no defense. *Reg.* v. *Stephens*, L. R., 1 Q. B. 702; *Rex* v. *Medley*, 6 Carr. & P. 292.

A license from the town is held to be no justification, in an action for a private nuisance. *Nichols* v. *Pixly*, 1 Root (Conn.), 129. And one sued as a tort-feasor, for damages, for a private nuisance, cannot defend on the ground that he has injured the plaintiff in a right which he had no authority to exercise. *Hendrick* v. *Johnson*, 5 Port. (Ala.) 208.

The fact that the place is a manufacturing place does not justify an *extraordinary* use of property, introducing a serious annoyance, in addition to those arising from the ordinary uses of property in that locality. *Mulligan* v. *Elias*, 12 Abb. (N. S.) 259.

§ 2. **Prescription.** There is no such thing as a prescriptive right or any other right to maintain a *public* nuisance. *Ogdensburgh* v. *Lovejoy*, 2 N. Y. Sup. Ct. (T. & C.) 83; S. C. affirmed, 58 N. Y. (13 Sick.) 662; *Mills* v. *Hall*, 9 Wend. 315. Thus, the damming of water, though in accordance with a prescriptive right, creates or causes such annoyance as seriously to interfere with the comfortable enjoyment of property, or has a direct tendency to create sickness in the immediate neighborhood, it constitutes a nuisance to which a claim for prescription is no defense. Id.; *Rhodes* v. *Whitehead*, 27 Tex. 304. See, also, *Reg.* v. *Brewster*, 8 Up. Can. R. (C. B.) 208; *Philadelphia, etc., R. R. Co.* v. *State*, 20 Md. 157; *Rochester* v. *Erickson*, 46 Barb. 92; *State* v. *Rankin*, 3 S. C. 438; S. C., 16 Am. Rep. 737; *Morton* v. *Moore*, 15 Gray, 573. Nor can an encroachment upon a street or public highway be legalized by the mere lapse of time. *Cross* v. *Mayor of Morristown*, 18 N. J. Eq. 305. And no length of time will legalize an unauthorized obstruction in a navigable stream. *DeLaney* v. *Blizzard*, 7 Hun (N. Y.), 7.

If a party may acquire a prescriptive right to continue a *private* nuisance, it can only be by continuous use for twenty consecutive years. *Campbell* v. *Seaman*, 63 N. Y. (18 Sick.) 568; S. C., 20 Am. Rep. 567. Such use and enjoyment must be open as of right (*Solomon* v. *Vintners' Co.*, 4 Hurlst. & N. 585; *Winship* v. *Hudspeth*, 10 Exch. 5), and with the knowledge, actual or presumed, of the person owning the fee. *Wood* v. *Veal*, 5 B. & Ald. 454; *Nichols* v. *Aylor*, 7 Leigh (Va.), 546.

The extent of the right of flowage acquired by prescription is not measured by the claim which the owner of the dominant tenement makes during the period of prescription, nor by the height of the structure of the dam he maintains on his own land. But it is limited

to the lines of the *actual* enjoyment of the easement, as evidenced by the extent to which the land of the owner of the servient tenement was habitually or usually flowed during the period of prescription. *Horner* v. *Stillwell*, 35 N. J. Law, 307. The mode and manner of the user cannot be materially changed or varied to the injury of others, unless the use, as changed, has been continued for a period of twenty years. *Prentice* v. *Geiger*, 9 Hun (N. Y.), 350. And see *Stiles* v. *Hooker*, 7 Cow. 266; *Noyes* v. *Morrill*, 108 Mass. 396; *Rexford* v. *Marquis*, 7 Lans. (N. Y.) 249. Thus, where a dam had been in existence more than twenty years, but had been raised a foot higher within twenty years, the occupant, in defense to an action against him for backing up the water to the injury of property above, claimed a prescriptive easement, and it was held that to establish the prescription the easement must have been enjoyed for twenty years, to the extent claimed at the trial. *Postlethwaite* v. *Payne*, 8 Ind. 104. See, also, *Dyer* v. *Depui*, 5 Whart. (Penn.) 584.

It was held in *Crosby* v. *Bessey*, 49 Me. 539, that where a tanner has thrown his ground bark into a stream for more than twenty years, he does not thereby acquire a right by prescription to do so, to the injury of the owner of land on the same stream below, on which the natural action of the water deposits the bark, unless it appears that the bark has been deposited on the *same* land, with the same injury, for the whole term of twenty years. And although the tanner and those under whom he claims have thrown their ground bark into the stream for more than twenty years, yet, if the owner of the land below has not been thereby annually damaged until within the last *six years*, this is not sufficient to establish a right by prescription, and the owner of the land injured may maintain an action for damages. And see *Webster* v. *Flemming*, 2 Humph. (Tenn.) 518; *Norton* v. *Volentine*, 14 Vt. 239.

It has, however, been held that the uniform and uninterrupted diversion of water from a running stream for a period of twenty years, gives a title by prescription, and that it is not necessary that the water should be used in *precisely* the same manner, or applied in the same way; but that no change could be made which would be injurious to those whose interests are involved. *Stein* v. *Burden*, 24 Ala. 130.

A prescription to render running water unfit for drinking or domestic purposes requires the strictest proof. And if an upper riparian proprietor claims the right of prescription to pollute the stream, he cannot do it to a greater extent than it was polluted at the commencement of the period of prescription. That is to say, if the pollution at the time was slight or not injurious to any extent, he cannot, at any time within

that period, increase it five or ten fold, so as entirely to destroy the water for domestic use. The right must be measured by the enjoyment, and it cannot be used in a different and more extensive manner. *McCallum* v. *Germantown Water Co.*, 54 Penn. St. 40.

That a use for twenty years is sufficient to legalize a *noisy* nuisance, see *Elliotson* v. *Feetham*, 2 Bing. N. C. 134; S. C., 2 Scott, 174. And see, as to the right of prescription to exercise a trade which sends smoke and offensive stenches over neighboring premises, *Roberts* v. *Clarke*, 18 L. T. (N. S.) 48; *Bliss* v. *Hall*, 4 Bing. N. C. 183; 6 Scott, 500; *Charity* v. *Riddle*, 14 E. C. (S. C.) 340.

Where one ground of defense to an action for the obstruction of a water-course was a right in the defendant, acquired by prescription, to raise the water, in the manner and to the height alleged, it was held that at the time when his dam was in the course of erection, and before it was so far completed as to permanently raise the water and set it back upon the plaintiff's premises, was not to be included in the duration of the use from which the prescriptive right was claimed. *Branch* v. *Doane*, 17 Conn. 401. And see *Polly* v. *McCall*, 37 Ala. 20; *Roundtree* v. *Brantley*, 34 id. 544; *Murgatroyd* v. *Robinson*, 7 El. & Bl. 391. See *Parker* v. *Foot*, 19 Wend. 309; *Young* v. *Spencer*, 10 B. & C. 145. See *ante*, Vol. 2, tit. *Easements*.

§ 3. **Legalized nuisances.** A work authorized by the legislature cannot be adjudged a nuisance, if executed in an authorized manner, in an authorized place. *Easton* v. *New York, etc., R. R. Co.*, 24 N. J. Eq. 49; *Stoudinger* v. *Newark*, 28 id. 187, 446; *Rex* v. *Pease*, 4 Barn. & Ad. 30. Thus, a person or a corporation having legal authority to construct a railroad or a turnpike, or to erect a bridge over a navigable stream, or to carry on a particular kind of business, cannot be proceeded against as for the erection or maintenance of a public nuisance (*People* v. *New York Gas-Light Co.*, 6 Lans. [N. Y.] 467; S. C., 64 Barb. 55; *Danville, etc., R R. Co.* v. *Commonwealth*, 73 Penn. St. 29; *Beckett* v. *Upton*, 33 Eng. Law & Eq. 108; *State* v. *Williamstown Turnpike Co.*, 4 Zabr. [N. J.] 547; *Vason* v. *South Carolina R. R. Co.*, 42 Ga. 637); provided, however, that the nuisance arises as a necessary and probable result of the act done in pursuance of the authority conferred. *Reg.* v. *Bradford Navigation Co.*, 6 Best & Sm. 631; *Richardson* v. *Vermont Central R. R. Co.*, 25 Vt. 465. Thus, where an act of the legislature declared a stream to be navigable, and prohibited the obstruction of the navigation thereof, by the erection of dams or otherwise, and a subsequent act authorized a person therein named to erect a dam across such stream, it was held that the only effect of the latter act was to remove the restriction im-

posed by the former act, and relieve the person building a dam in pursuance of the authority given to him, from liability to prosecution, by indictment or otherwise, for obstructing the navigation, and that it afforded no protection for nuisances occasioned by the dam in other respects. *Clark* v. *Mayor, etc., of Syracuse*, 13 Barb. 32. It is likewise to be understood that a legislative grant operates as an excuse or defense only against those acts which, in the exercise of the highest degree of care and skill to avoid injurious results, still operate injuriously. If negligence can be shown, an individual or a corporation will be held liable for all the consequences civilly and criminally, resulting therefrom, notwithstanding the grant. *Crittenden* v. *Wilson*, 5 Cow. 165; *People* v. *President, etc., of New York Gas-Light Co.*, 6 Lans. (N. Y.) 467; S. C., 64 Barb. 55; *Walker* v. *Board of Public Works*, 16 Ohio, 540; *Louisville* v. *Rolling Mill Co.*, 3 Bush (Ky.), 416; *Wilson* v. *City of New Bedford*, 108 Mass. 261; S. C., 11 Am. Rep. 352; *Lee* v. *Pembroke Iron Co.*, 57 Me. 481; 2 Am. Rep. 59; *Biscoe* v. *Great Eastern Railway Co.*, L. R., 16 Eq. Cas. 636; S. C., 7 Eng. R. 630; *Ricket* v. *Metropolitan Railway Co.*, L. R., 2 H. L. 175. And the act must not be in excess of the power given (*Commonwealth* v. *Old Colony R. R. Co.*, 14 Gray, 93); and the fact that the excess arises from a misapprehension of the power conferred is no excuse. *Hudson River R. R. Co.* v. *Artcher*, 6 Paige, 83; *Sandford* v. *Railroad Co.*, 24 Penn. St. 378. A railroad authorized by its charter to be made at one place, if made at another, is held to be a mere nuisance on every highway it touches in its illegal course. *Commonwealth* v. *Erie, etc., R. R. Co.*, 27 id. 339.

So, an individual or a corporation has no authority to obstruct the navigation of a river, under a legislative grant of power, merely for the building of a bridge across the river, when the bridge can reasonably be constructed so as not to destroy the navigability of the river. *Hickok* v. *Hine*, 23 Ohio St. 523; S. C., 13 Am. Rep. 255.

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